> I didn't receive my medication during med pass; my health depends on it. I must take it daily as prescribed by my doctor. My private medical information [is] being discussed with the staff members that aren't medical. A statement was made about my medication, the staff member knew the type of med.

(*Id.* ¶¶ 43–44 (alteration in original).) Sergeant Hill received the grievance and met with Williams in person. (*Id.* ¶¶ 45–47.) Williams cried and begged Hill to get his medication because without it he "was more at risk of [COVID-19] or death." (*Id.* at ¶ 46.) Hill told Williams that he had relayed his concerns to James "and that she would come to speak to" Williams. (*Id.* ¶ 47.) James never spoke with him. (*Id.* ¶ 48.) Williams appealed his grievance resolution that same day. On June 7, June 10, July 5, July 6, July 7, July 9, and July 13, 2021, Williams sent correspondence forms to "multiple prison staff [members]" voicing his concerns. (*Id.* ¶ 50.)

On July 2, 2021, Mitchell—the fellow inmate mentioned above—punched Williams in the face because Williams "did [Mitchell's] hair and could have given him" his disease. (*Id.* ¶ 52.) The night of the assault, Deputy Ames had left Mitchell's and Williams's cell blocks unlocked. (*Id.* ¶¶ 54, 55.)[2] As a result of the assault, Williams suffered "a busted lip, blackened eyes, [a] potential fracture to his nose," "light headedness from the inability to breathe through his nose, blurred vision, extreme pain from nasal septum deviation, headaches, dizziness, and vomiting." (*Id.* ¶ 57.) Williams received pain medication, but he did not initially receive an X-ray (*Id.* ¶¶ 58–61.) He never received his X-ray results despite his many requests. (*Id.* ¶ 62.)

On July 14, 2021, Senior Deputy Fowler responded to Williams (presumably to one of his correspondence forms) and explained that Williams "should have never received a grievance" for his medical privacy concerns. (*Id.* ¶ 66.) On July 18 and 23, 2021, Williams sent out more correspondence forms to "prison staff." (*Id.* ¶ 67.) On July 30, 2021, Captain Mallard "advised

[2] Though named as a defendant, Ames has not yet been served.

[Williams] that there is not a deputy that deals with HIPAA[3] violations." (*Id.* ¶ 68.) On July 31, 2021, Williams filed a second grievance form outlining the same complaint from the first grievance. (*Id.* ¶ 69.) Sergeant Ellery received the second grievance and completed a "supervisor statement" noting that Williams had spoken with Mallard. (*Id.* ¶ 70.) On August 7, 2021, Williams wrote to Sheriff Olson "to indicate his dissatisfaction with the meeting with ... Mallard and [Nurse] Patricia Stone and requested his grievance be taken seriously." (*Id.* ¶ 72.)

Ultimately, Williams missed "at a minimum" seven to ten daily doses of medication during his eleven months at the Chesapeake Correctional Center. (*Id.* ¶ 23.) He contracted COVID-19 after being transferred to a new jail, and he suffered symptoms including a headache, fever of 103 degrees, diarrhea, vomiting, fatigue, loss of appetite, shortness of breath, excessive sleeping, and bone pain. (*Id.* ¶ 76.)

II. ANALYSIS[4]

. . .

D. Failure to Provide Adequate Medical Care (Count Four)

Williams raises a failure to provide adequate medical care claim under Section 1983 against Gore, Fowler, Mallard, Ellery, Hill, and the medical defendants. (ECF No. 16 ¶ 127.) He alleges

[3] Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996).

[4] In considering Rule 12(b)(6) motions, a court must accept all allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 253 (4th Cir. 2009) (citing *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999)). Pleadings consisting of "no more than conclusions," however, "are not entitled to the assumption of truth." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). To survive a Rule 12(b)(6) motion to dismiss, a complaint must state facts that, when accepted as true, state a claim to relief that is plausible on its face. *Id.* "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).

that these defendants acted with deliberate indifference to his medical needs to the point of violating his Fourteenth Amendment rights. (*Id.* ¶ 125.)

The Eighth Amendment guarantees inmates' access to medical care while incarcerated. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994).[10] "[D]eliberate indifference to a prisoner's serious illness or injury states a cause of action under [Section] 1983." *Estelle v. Gamble*, 429 U.S. 97, 105 (1976). For a deliberate indifference claim, prison officials must know of an excessive risk to an inmate's health or safety and disregard that risk. *Farmer*, 511 U.S. at 835. The harm or risk of harm must be "objectively, sufficiently serious," *id.* at 834 (quoting *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)), and the officials must have a "sufficiently culpable state of mind," *id.* (quoting *Wilson*, 501 U.S. at 297). "*Farmer* expressly equated the 'deliberate indifference' standard applied in Eighth Amendment cases with the 'subjective recklessness' standard of criminal law." *Brown v. Harris*, 240 F.3d 383, 389 (4th Cir. 2001) (citing *Farmer*, 511 U.S. at 839–40). An official who responds reasonably to a known excessive risk is not deliberately indifferent, even if the response failed to prevent the threatened harm. *Id.* at 389 (quoting *Farmer*, 511 U.S. at 844).

Williams's particular medical condition presents a sufficiently serious risk of harm. *See, e.g., Taylor v. Barnett*, 105 F. Supp. 2d 483, 487 (E.D. Va. 2000). Thus, the Court must address whether the defendants possessed the requisite state of mind.

[10] Although Williams grounds his Section 1983 claims in the Fourteenth Amendment, "[courts in the Fourth Circuit] traditionally apply Eighth Amendment deliberate indifference precedents to such claims" arising out of the treatment of pretrial detainees. *Moss v. Harwood*, 19 F.4th 614, 624 (4th Cir. 2021).

1. Gore, Fowler, Mallard, & Ellery

Williams fails to allege that Gore, Fowler, Mallard, or Ellery possessed the knowledge required for deliberate indifference.[11] In *Moss v. Harwood*, the Fourth Circuit held that the inmate had not satisfied the subjective prong of the deliberate indifference test merely through repeated requests for his medication to non-medical personnel. 19 F.4th at 625 ("[A] request for medication does not by itself indicate an emergency, and none of [the plaintiff's] communications conveyed to the defendants that immediate intervention was required to avoid a substantial risk of harm."). Nor was general knowledge concerning the severity of the plaintiff's condition—thyroid disease—enough to suggest that the jail officials knew the risks associated with delayed medication. *Id.* Likewise, Williams cannot show that Gore, Fowler, Mallard, or Ellery knew of the risk to his health through mere requests for medication or even knowledge of his medical condition. First, the complaint does not suggest that Gore understood the severity of Williams's condition. Williams only asked Gore to retrieve medical staff so that he could take his medication, (ECF No. 16 ¶ 33), but "a request for medication does not by itself indicate an emergency." *Moss*, 19 F.4th at 625. Additionally, as discussed above, non-medical personnel's knowledge of a medical condition does not alone satisfy the subjective prong of a deliberate indifference claim. Thus, Williams fails to state a claim of deliberate indifference against Gore.

[11] The jail defendants also argue that, because Williams had no constitutional right to a grievance procedure, *Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 541 (4th Cir. 2017), he cannot bring a constitutional claim based on inadequacies in such a procedure, (ECF No. 41, at 4). Williams's claims, however, expand beyond mere inadequacies in the grievance procedure. He refers to his many grievances only to establish the requisite state of mind for deliberate indifference. For the Court to dismiss on these grounds would suggest that alleging inadequacies in a grievance procedure waives related constitutional claims. Thus, the Court will decide on the motion to dismiss the deliberate indifference claim on other grounds.

Though unclear, Fowler may have received a written form restating the concerns in Williams's first grievance. (ECF No. 16 ¶¶ 50, 66.) Williams does not, however, explain the extent to which he communicated the risk that came with delayed medication. Similarly, Williams does not allege that he communicated the severity of his condition in his conversation with Mallard about his privacy concerns. (*Id.* ¶ 68.) Ellery also received Williams's second grievance, but the contents of that form are unclear. (*Id.* ¶¶ 69–70.)

Though Fowler, Mallard, and Ellery might have known that Williams had missed doses of a daily prescription for a serious condition, Williams still fails to state a claim because the defendants lacked any expertise to assess any risk associated with missed doses of his medication. Given the discreet nature of Williams's condition, he fails to allege facts that would suggest the jail defendants understood the severity of his condition. *See Moss*, 19 F.4th at 625.[12] The Court will thus grant the motion to dismiss Count Four against Gore, Fowler, Mallard, and Ellery.

2. Hill

Unlike for the other jail defendants, Williams clearly communicated the severity of his condition to Hill in their meeting because he explained he faced a greater risk of contracting COVID-19. (ECF No. 16 ¶ 46.) Hill, however, responded reasonably by speaking to medical personnel about the delays. *See Farmer*, 511 U.S. at 844; *see, e.g., Moss*, 19 F.4th at 625 (explaining that even if the defendants knew of a risk to the inmate's health, they were not indifferent because they informed medical staff of the inmate's requests). Thus, Williams fails to

[12] This is not to say that non-medical personnel can never be deliberately indifferent. The bar, however, is much higher because the risk must be much more apparent. *See, e.g.*, *Scinto v. Stansberry*, 841 F.3d 219, 232 (4th Cir. 2016) (finding there was sufficient circumstantial evidence—inmate was vomiting blood for several days—to put the prison officials on notice of risk to inmate's health); *Lolli v. County of Orange*, 351 F.3d 410, 420–21 (9th Cir. 2003) (finding that prison officials knew of risk to diabetic inmate who had not received insulin due to obvious acute symptoms).

state a claim for deliberate indifference against Hill, and the Court will dismiss Count Four against him.

3. Stone & Tyler

For deliberate indifference claims against medical personnel, "an assertion of mere negligence or malpractice is not enough to constitute [a constitutional] violation." *Taylor*, 105 F. Supp. 2d at 487 (citing *Estelle*, 429 U.S. at 106; *Daniels v. Williams*, 474 U.S. 327, 328 (1986); *Miltier v. Beorn*, 896 F.2d 848, 851–52 (4th Cir. 1990), *overruled in part on other grounds by Farmer*, 511 U.S. at 837). Medical personnel, however, do not benefit from the apparent leniency afforded non-medical personnel for non-obvious health risks. *See Moss*, 19 F.4th at 625. To satisfy the deliberate indifference test, "the treatment given must be 'so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness.'" *Hixson v. Moran*, 1 F.4th 297, 303 (4th Cir. 2021) (quoting *Miltier*, 896 F.2d at 851). For a deliberate indifference claim arising from a delay in care, a plaintiff must allege facts that suggest the delay resulted in "substantial harm." *Oden v. Wilson*, No. 3:17cv489, 2019 WL 6357247, at *10 (E.D. Va. Nov. 27, 2019). A plaintiff may satisfy the substantial harm requirement through "lifelong handicap, permanent loss, or considerable pain." *Id.* (quoting *Garrett v. Stratman*, 254 F.3d 946, 950 (10th Cir. 2001)). Deliberate indifference cases arising from treatment for Williams's particular medical condition require "a careful evaluation of all the facts and circumstances surrounding the allegations." *Taylor*, 105 F. Supp. 2d at 488. "[T]he mere fact that [a] correctional facility fails to provide an inmate with prescribed medication on a timely basis is not sufficient to state a claim of deliberate indifference." *Id.* at 487.

Williams's allegations concerning Tyler and Stone do not indicate a state of mind beyond mere negligence. While a plaintiff may use circumstantial evidence to satisfy the subjective prong

of deliberate indifference, *Coppage v. Mann*, 906 F. Supp. 1025, 1039 (E.D. Va. 1995) (quoting *Farmer*, 511 U.S. at 842), Williams does not allege facts that suggest Tyler knew of the delay in medication. He does not allege that he ever contacted or spoke with Tyler to put him on actual notice. (ECF No. 16 ¶ 13.) Likewise, Williams does not allege that Stone knew of the delays in his medication. He alludes to her presence in his meeting with Mallard, but he does not explain what they discussed at that meeting beyond privacy concerns. (ECF No. 16 ¶ 68 ("On July 30, 2021, ... Mallard advised [Williams] that there is not a deputy that deals with HIPPA violations").) Thus, the Court will dismiss Count Four against Tyler and Stone.

4. White

White was the first person that Williams spoke to concerning his missed doses of medication and lack of bloodwork during his time at the Chesapeake Correctional Center. (ECF No. 16 ¶¶ 25–29.). Thus, White had actual knowledge of Williams's grievances. Further, because Williams alleges that he explained to White his increased susceptibility to illness, (*id.* ¶ 26), she may have known of the substantial risk to his health. Her alleged response of "that is not my problem," (*id.* ¶ 27), suggests a state of mind more culpable than "mere negligence or malpractice." *See Taylor*, 105 F. Supp. 2d at 487. Additionally, Williams alleges that he contracted COVID-19 due to increased vulnerability after missing several doses of his medication and that he suffered several symptoms. (ECF No. 16 ¶ 76.) This raises the inference that his delay in care resulted in "substantial harm." *See Oden*, 2019 WL 6357247, at *10. It remains unclear whether White's conduct was "so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness." *Miltier*, 896 F.2d at 851. But to adequately assess White's conduct requires reference to an appropriate standard of care, *see Badu v. Broadwell*, No. 5:11-CT-3192-F, 2013 WL 286262, at *5 (E.D.N.C. Jan. 24, 2013) (denying doctor's motion to

dismiss because his "defense that his treatment nevertheless exceeded the constitutional minimum is better argued upon a more fully developed record in summary judgment proceedings"). Thus, it would be premature for the Court to dismiss Williams's claim without more information. Accordingly, the Court will deny White's motion to dismiss Count Four.

5. James

Though James never spoke with Williams, Williams can satisfy the subjective prong of the deliberate indifference test with circumstantial evidence. *See Coppage*, 906 F. Supp. at 1039 (quoting *Farmer*, 511 U.S. at 842).[13] The fact that Williams requested that White inform James specifically of the lack of bloodwork suggests that James knew about Williams's medical needs. (*See* ECF No. 16 ¶ 28.) Furthermore, Hill informed James of Williams's grievances regarding his missed medication, and Hill said James would come to speak with Williams. (*Id.* ¶¶ 45–47.) The fact that James never spoke with Williams, (*id.* ¶ 48), raises the inference that James ignored Williams's grievances. Without knowing the reason for the delays, the Court should not dismiss Williams's claim against James at the pleading stage:

> The common thread throughout [cases concerning inadequate treatment in prison for Williams's particular medical condition] is a careful evaluation of all the facts and circumstances surrounding the allegations of denial of proper medical care to determine whether the defendant acted with deliberate indifference or acted upon informed medical judgment, even if that judgment was in error.

Taylor, 105 F. Supp. 2d at 488. Because James's choice to ignore him may have caused the delay in medication, Williams has adequately stated a constitutional claim of deliberate indifference against James. Thus, the Court will deny James's motion to dismiss Count Four.

[13] The fact that Williams "*received 320 doses* of [his] medication while ... incarcerated," (ECF No. 72 ¶ 18 (emphasis in original)), does not absolve James of constitutional liability, *see De'Ionia v. Johnson*, 708 F.3d 520, 526 (4th Cir. 2013) ("[J]ust because [the defendants] have provided [the plaintiff] with some treatment consistent with the ... Standards of Care, it does not follow that they have necessarily provided her with constitutionally adequate treatment.").

Applicant Details

First Name	**Corina**
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Citizenship Status	**U. S. Citizen**
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Address	**Address** Street **188 Humboldt St. Apt 5C** City **Brooklyn** State/Territory **New York** Zip **11206** Country **United States**
Contact Phone Number	**17192072918**

Applicant Education

BA/BS From	**Villanova University**
Date of BA/BS	**May 2019**
JD/LLB From	**University of Pennsylvania Carey Law School** **https://www.law.upenn.edu/careers/**
Date of JD/LLB	**May 14, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Journal of Law and Social Change**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Keedy Cup**

Bar Admission

Admission(s)	**New York**

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Specialized Work Experience	**Appellate, Prison Litigation**

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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June 5, 2023

The Honorable Juan R. Sánchez
United States District Court
James A. Byrne United States Courthouse
601 Market Street
Philadelphia, PA 19106

Dear Chief Judge Sánchez,

I am writing to request your consideration of my application for a 2024-2025 clerkship with your chambers. I received my J.D. from the University of Pennsylvania Law School in May 2022, and I am currently an Equal Justice Works (EJW) Fellow at the Center for Appellate Litigation in New York City.

As an attorney in appellate practice, I have worked on a wide range of complex legal issues, which has sharpened my analytical abilities and refined my legal research and writing skills. In my current role, I represent incarcerated survivors of domestic violence in a variety of post-conviction proceedings. During law school, I sought out opportunities to advocate for clients who are routinely denied meaningful access to legal services. As a legal intern at the ACLU National Prison Project, the Lawyers' Committee for Civil Rights, and the Brennan Center for Justice, I worked on high-impact cases that contributed to the advancement of justice in the areas of voting rights, education equity, and criminal justice reform. These internships required me to analyze constitutional, statutory, and stare-decisis considerations, further enhancing my ability to navigate intricate legal frameworks and develop cogent arguments.

Alongside experiential learning, I embraced opportunities to develop my legal practice skills. As a third-year law student, I was selected as a Littleton Fellow. In that role, I taught a legal research and writing course to a cohort of first-year students. This experience strengthened my ability to explain complicated legal concepts in a clear and concise manner and confirmed my passion for legal education and mentorship. Additionally, as one of four finalists in Penn Law's flagship appellate advocacy competition, the Keedy Cup, I demonstrated my ability to construct persuasive legal arguments by briefing a pending Supreme Court case and arguing the case before three federal judges. I received the award for best brief.

Further, I directed several pro bono initiatives at Penn Law where I mobilized fellow students to provide legal assistance to underserved communities. These programs allowed me to apply my legal research and writing skills in a practical manner while fostering a collective commitment to equal access to justice.

I would be grateful for the opportunity to interview with you and discuss how my skills align with the needs of your chambers. Given your unwavering commitment to mentoring clerks who share your strong dedication to public service, clerking in your chambers would be my top choice. I have enclosed a resume, law school transcript, and writing sample. Penn will submit letters of recommendation from Professors Catherine Struve and Karen Lindell, as well as from Kate Skolnick, Supervising Attorney at the Center for Appellate Litigation. Thank you for your time and consideration.

Sincerely,

Corina Scott

Corina Scott

Corina Scott
188 Humboldt St., Apt 5C | Brooklyn, NY 11206
(719) 207-2918 | corinas2@pennlaw.upenn.edu

Education

University of Pennsylvania Law School
Juris Doctor, May 2022
Honors: Keedy Cup Finalist - Won Best Brief in Penn's Appellate Advocacy Competition
Associate Editor, *Journal of Law and Social Change*
Research and Teaching Assistant for Professor Benjamin Jealous
Littleton Fellow, Teaching Assistant for 1L Legal Research & Writing Class
Activities: Equal Justice Foundation, Co-Director
Prison Legal Education Project, Co-Director
Penn Law Mock Trial Association, Participant
Public Interest Service Corps, Member and Mentor
Morris Fellow, Mentor to First Year Students

Villanova University
Bachelor of Arts, *summa cum laude*, English, May 2019
Honors: English Honor Society
Awarded Best Undergraduate Essay at the Philadelphia Gender and Women's Studies (GWS) Student Research Conference (April 2019)
Thesis: "Who Can Be Un-Womaned? The Paradoxical Rigidity and Fluidity of the Gender Binary in the Prison System"
Activities: Villanova Coalition for Sustainability, Co-Founder
Service Learning Community, Student Facilitator

Experience

Center for Appellate Litigation, New York, NY Sept 2022 – Present
Equal Justice Works Fellow, Sponsored by Ropes & Gray
Represent incarcerated survivors of domestic violence in post-conviction proceedings, draft appellate briefs, conduct oral arguments, advocate for legislative amendments to the Domestic Violence Survivors Justice Act (DVSJA) as part of a statewide task force.

The Brennan Center for Justice, New York, NY Jan – May 2022
Legal Intern - Democracy Program
Tracked and summarized litigation trends in voting rights cases, analyzed key issues for amicus briefs, conducted legal research on voting rights issues, edited and cite-checked reports, drafted legislative testimony.

The Legal Aid Society, New York, NY June – Aug 2021
Legal Intern - Special Litigation Unit
Drafted bail applications and writs of habeas corpus, conducted client interviews, assisted with hearing preparation, conducted legal research on systemic issues related to pretrial detention.

American Civil Liberties Union, Washington, DC Jan – May 2021
Law Clerk - National Prison Project
Conducted legal research on conditions of confinement issues, drafted legal memoranda, affidavits, and briefs, organized and summarized discovery, tracked solitary confinement legislation, drafted report on conditions in ICE detention, participated in advocacy campaigns.

The Lawyers' Committee for Civil Rights, Washington, DC Sept – Dec 2020
Legal Intern - Public Policy Unit
Drafted legal memoranda on criminal justice, education, and employment policy, assisted in transition planning for the next federal administration, participated in criminal justice reform and voting rights task force coalitions, conducted research on judicial nominees.

Community Legal Services, Philadelphia, PA June – Aug 2020
Legal Intern - Youth Justice Project
Provided holistic direct legal services to young clients in the areas of employment, SSI, and public benefits, conducted intake, drafted SSI appellate briefs, conducted research on racial disparities in access to SSI benefits, assisted in the Ban The Box campaign.

Youth Advocacy Project, Philadelphia, PA Aug 2019 – May 2022
Co-Director (3L); *Case Manager (2L); Direct Service Fellow (1L)*
Advocated for young persons being prosecuted as adults, drafted comprehensive mitigation reports, developed case strategies, interviewed client and family, analyzed records, and developed re-entry plan, provided community resources for client.

Lipka Law Colorado, Colorado Springs, CO June – Aug 2019
Criminal Defense Intern
Assisted in criminal defense cases, synthesized case notes and monitored media impact, summarized audio and video discovery and reviewed witness transcripts, prepared and reviewed mitigation reports.

American Civil Liberties Union of PA, Philadelphia, PA Jan – May 2019
Legal Intake Intern June – Aug 2018
Summarized complaints and made case recommendations, interviewed clients about civil rights complaints and provided referrals, conducted legislative research, monitored bail hearings, assisted in organizing community events.

Pennsylvania Prison Society, Philadelphia, PA Sept – Dec 2018
Correspondence Intern
Corresponded with incarcerated persons by mail and phone to monitor prison conditions, addressed complaints and provided resources and referrals, assisted with re-entry program and mentoring initiative, coordinated official visitors.

Corina Scott | L'22
UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

Fall 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure	Catherine Struve	A-	4	
Contracts	David Hoffman	A-	4	
Torts	Jonathan Klick	A-	4	
Legal Practice Skills	Jessica Simon	CR	4	
Legal Practice Skills Cohort	Molly Wolfe	CR	0	

Spring 2020
*In response to the COVID-19 pandemic, the law school instituted a mandatory credit/fail grading system for the Spring 2020 semester.

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Criminal Law	Stephen Morse	CR	4	
Constitutional Law	Seth Kreimer	CR	4	
Administrative Law	Cary Coglianese	CR	3	
Reproductive Rights & Justice	Dorothy Roberts	CR	3	
Legal Practice Skills	Jessica Simon	CR	2	
Legal Practice Skills Cohort	Molly Wolfe	CR	0	

Fall 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Evidence	David Rudovsky	B+	4	
Juvenile Justice Seminar	Jessica Feierman/ Marsha Levick	A	3	
Externship – Lawyers' Committee for Civil Rights Under Law	Supervisor: Demelza Baer	CR	7	
Associate Editor – Journal of Law & Social Change	Seth Kreimer	CR	1	
Journal of Law & Social Change Independent Research Seminar	n/a	CR	1	

Spring 2021

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Federal Courts	Catherine Struve	B+	4	
Law, Race, and Comm. Seminar	Brittany Farr	A	3	
Keedy Cup Preliminaries	Gayle Gowen	CR	1	
Externship – National ACLU	Supervisor: Eric Balaban	CR	6	
Teaching/Research Assistant	Benjamin Jealous	CR	2	

Corina Scott | L'22
UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

Fall 2021

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Constitutional Litigation	Seth Kreimer	A-	4	
Constitutional Criminal Procedure	David Rudovsky	B+	3	
Professional Responsibility	Alicia Hickok	A	2	
Keedy Cup Finalist	Gayle Gowen	CR	2	
Littleton Fellow	Karen Lindell	CR	4	

Spring 2022

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Anti-discrimination Law	Shaun Ossei-Owusu	A	3	
Legislative Clinic	Louis Rulli	A	7	
Littleton Fellow	Karen Lindell	CR	3	

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MARIANNE C. YANG

May 29, 2023

Re: Corina Scott

Your Honor:

I write in support of Corina Scott's application. I have known Corina since the fall of 2022, when she began working as an Equal Justice Works-funded fellow at the Center for Appellate Litigation ("CAL"), a nonprofit appellate public defender office in New York City.

Since the start of her tenure, Corina has impressed me with her keen intellect, writing abilities, and capacity to balance multiple priorities at once. She is a quick study, getting up to speed on a range of issues, including but not limited to grasping New York's entire complicated sentencing structure and the arcane procedures of its post-conviction vacatur law. She has stood out to me as among the strongest young lawyers I have had the chance to supervise in over a decade of working with students and recent law graduates.

Corina's fellowship project explores the intersection of several post-conviction projects at CAL, yet is itself novel. Specifically, she aims to find avenues of relief for those who are serving long sentences and have histories of extensive trauma, but who might not fit squarely within the Domestic Violence Survivors Justice Act, a law meant to benefit survivors of domestic violence but interpreted narrowly to date by the courts. As a result, her project requires creativity, synthesis of many different areas of law, and self-direction. By the time she comes to me to discuss a case, she has already done substantial groundwork, researching the legal landscape and devising ideas for how to help the client.

I am confident that Corina would be an exceptional judicial clerk. Her writing is extraordinarily clear and the product of careful thought and research. She brings energy, dedication, and thoughtfulness to her work. She is respectful of clients, coworkers, and other actors in the legal system, and I know she would comport herself with professionalism and dynamism as a clerk. I enthusiastically recommend her for a position with your chambers.

Finally, I'll note that Corina has had to weather the departure of two supervisors: one earlier this year, and now myself, who is leaving CAL imminently. She has done so with good cheer and unflappability, qualities that I know would serve her in this role too. If you have any questions, please contact me at kskolnick@cfal.org (until June 15), or ks7503@nyu.edu (after June 15).

Sincerely,

Kate Skolnick
Supervising Attorney

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

June 06, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Re: Clerkship Applicant Corina Scott

Dear Judge Sanchez:

I am writing to provide my highest recommendation of Corina Scott to serve as a law clerk in your chambers for the 2024-25 term. Corina was a star during her time at Penn Carey Law, and since her graduation in 2022 she has honed her top-notch legal skills as an Equal Justice Works fellow at the Center for Appellate Litigation. She's also a mature, kind, and collaborative person who is committed to using her law degree to advance equal access to justice. Based on my own experience as a law clerk and as a public interest attorney, I am confident Corina would be a valuable addition to your chambers, and that she'll go on to be a powerful advocate for social justice.

I met Corina in the fall of 2021, when she was assigned to be one of my three Littleton Fellows – the prestigious teaching fellowship awarded to select third-year law students at Penn Carey Law. As a Littleton Fellow, Corina taught a 15-student cohort of my required year-long Legal Practice Skills course. Her responsibilities included planning and teaching a weekly class, mentoring first-year law students, and providing detailed written feedback on two major student writing assignments, all under my supervision. Through this close working relationship, I became deeply acquainted with Corina's skills in writing, editing, and legal analysis, and I got to know her well as a person, too. I then advised Corina in her applications for post-graduate public interest fellowships, drawing on my own experience as a Skadden Fellow and as a supervising attorney at Juvenile Law Center. Since Corina graduated, we have remained in close touch, and I have witnessed her transformation from outstanding law student to brilliant and effective attorney. I am therefore well acquainted with Corina's many talents, and I believe they will make her an outstanding law clerk.

First, Corina is an absolute all-star in the fundamental legal practice skills of research, writing, analysis, and oral communication. To be selected as a Littleton Fellow, a law student must already be an elite legal writer, and the position only deepens that skill set. Fellows solidify their grasp of strong legal analysis by teaching it to their students, and they come to more deeply understand what makes writing excellent by reading and critically analyzing student work. Corina excelled in her role as a Littleton Fellow, proving to be an astute editor, consistently providing helpful and on-point feedback to students, and demonstrating her keen analytical instincts at every turn. She also readily put her ever-expanding skills into practice in her own work, advancing to the finals of the law school's highly competitive moot court competition and winning the award for the best brief. Indeed, throughout law school, Corina seized opportunities to build her practice skills, maxing out the number of credits she could earn through experiential courses with her multiple externships, clinical work, RA and TA positions, role on the Journal of Law and Social Change, and success in the moot court competition. Now, as an attorney at the Center for Appellate Litigation, Corina has written multiple briefs on behalf of her clients, and she has advocated for their interests both in court and as part of a legislative task force. She would therefore enter your chambers fully equipped to produce outstanding bench memos and draft opinions from Day One.

Second, Corina has the strong work ethic, time management skills, and collaborative mindset needed to succeed in the demanding and close-knit chambers environment. As evidenced by the many challenging responsibilities she took on (and excelled at!) as a law student, she is unafraid of hard work. Beyond her experiential courses, Corina took rigorous doctrinal classes, including Federal Courts and Constitutional Litigation (two of the hardest courses at the law school). She was also a student leader – co-directing the Equal Justice Foundation, the Prison Legal Education Project, and the Youth Advocacy Project, and serving in both formal and informal mentorship roles to other students. She managed these multiple competing tasks with unfailing grace and poise, never letting stress get the better of her. In her role as a Littleton Fellow, Corina consistently produced high quality work on time, requiring minimal supervision. She also collaborated well with her co-Fellows – sharing ideas, combining forces where helpful, and using their collective knowledge to solve problems. Corina also knows when to ask for guidance, and she is extremely responsive to feedback. In short, she is an excellent supervisee, and I would hire her in a heartbeat if I were still in practice.

Beyond these more tangible skills, Corina would also bring her maturity, kindness, and professionalism to your chambers. Corina is a warm, vibrant person, and she displays genuine concern for the well-being of those around her. She was beloved by her students, and I could trust her to handle the few difficult student situations she encountered with professionalism and compassion. Even while still in law school, Corina seemed more mature in her demeanor than many of her peers, and she would enter your chambers with the additional confidence and maturity gained in her two years of practice experience.

Last, but certainly not least, Corina is committed to using her law degree to expand access to justice for underserved communities. Corina has been advocating for people pushed to the margins of society since before she started law school – interning with the Pennsylvania Prison Society and the ACLU of PA while still in undergrad, providing direct legal services to clients during summer internships at Community Legal Services and with the Legal Aid Society's special litigation unit, and now representing survivors of domestic violence as an Equal Justice Works fellow. Throughout these experiences, she has partnered

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with her clients in their representation, learning from them while serving as their zealous advocate. She will bring the perspectives gained through those experiences to her role as law clerk, and – in turn – will take the skills learned while clerking with her when she returns to her role as a legal advocate, fighting even more zealously to ensure her clients receive fair and equal treatment before the law.

In sum, Corina has the skills and experience necessary to be a fantastic law clerk, and I recommend her without any reservation. Please let me know if you have any questions or would like to discuss Corina's application further.

Sincerely,

Karen U. Lindell
Senior Lecturer, Legal Practice Skills
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UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

June 06, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Re: Clerkship Applicant Corina Scott

Dear Judge Sanchez:

tt is applying for a clerkship in your chambers. Corina is a gifted advocate with a deep commitment to the public interest and to the rights and wellbeing of incarcerated people. She will be an excellent law clerk and I recommend her with great enthusiasm.

I've had the pleasure of teaching Corina in two demanding doctrinal courses – Civil Procedure and Federal Courts. In my 87-student Civil Procedure class I used the Socratic method and I did not let the students know in advance on which days I would call on them. I called on Corina on a day when I had given the students a real case file and required them to comb through it to apply the doctrines we had learned thus far; Corina did well in answering my questions. On the time-pressured, in-class Civil Procedure final exam, Corina's thoughtful answers earned her an A-minus for the course – a very strong grade considering that Penn Law strictly enforces a grading curve for 1L courses such as mine. Corina did a particularly nice job with an Erie analysis concerning the scope of discovery.

In Federal Courts, I use a panel system to ensure that I call on each student multiple times during the semester. For the first few days, I solicit volunteers, because those dates fall during the period when students are still deciding whether to take the course. Corina kindly volunteered for our first panel, and helpfully discussed the Court's interpretation, in Marbury v. Madison, of Article III's delineation of the Supreme Court's original and appellate jurisdiction. On her second panel day, Corina provided a lucid and precise exposition of cases involving Congress's power, under Section 5 of the Fourteenth Amendment, to abrogate state immunity from suit. Corina's well-argued responses on the final exam placed her right at the top of the B-plus grade range. And Corina did a better job on one of the questions – a challenging federal-habeas issue spotter concerning issues of procedural default and new law – than most of the students who received a straight A.

Corina's intellectual, academic, and lawyering paths all reflect her concern for incarcerated people. She began her undergraduate studies as a political science major. But the summer after her sophomore year, Corina interned with the Appalachian Prison Book Project – an organization that mails books to prison inmates, fosters book clubs in prisons, and provides support for degree programs for inmates. Many of the Project's volunteers were either English professors or students majoring in English, and – catching their enthusiasm – Corina changed her major to English in her junior year. (She would go on to make this late-in-the-game switch seem easy, graduating summa cum laude.) Corina's senior thesis melded her newfound scholarly interest with her focus on the carceral system: she examined concepts of gender within the prison system in the 19th through 21st centuries – bringing to bear sociopolitical and historical as well as literary analysis. Meanwhile, Corina sought out volunteer opportunities to learn about both legal and nonlegal work with incarcerated people. She interned with the ACLU of Pennsylvania (where she did legal research and client intake) but also with the Pennsylvania Prison Society (where she assisted with the reentry program and helped to respond to concerns of inmates and their families).

Here at Penn Law, Corina's extracurricular work reflected her concern for inmates, her broader commitment to the public interest, and her affinity for research and writing. During her 1L year she joined the Youth Advocacy Project, which pairs law students with social work students to develop mitigation reports for young clients in the criminal justice and juvenile systems and to connect those clients with community resources. Corina took on progressively greater responsibility in the Project, serving as a case manager in her 2L year and being selected to serve as co-director during her 3L year. As a 1L, Corina also volunteered with the Prison Legal Education Project, which sends students into correctional facilities to teach legal concepts and research skills. The Prison Legal Education Project was on hold during Corina's 2L year because the pandemic shut off access; but Corina took on the role of co-director for this project, too, during her 3L year. In addition to teaching legal research and writing to inmates, Corina also taught those skills to first-year law students – because my colleagues in the Legal Practice Skills ("LPS") program selected her to serve as one of the 3L instructors who help to teach the 1L LPS course. Corina joined the Journal of Law and Social Change, which involves all its student editors in the work of selecting articles for publication. Corina is also a star advocate: she was one of the four students in the class of 2022 who advanced to the final round of Penn Law's signature Keedy Cup moot court competition, and she and her teammate won "best brief," making them the winners of the Keedy Cup. Corina made sure to round out her legal experience by interning with a criminal defense lawyer, with Community Legal Services, with the Lawyers' Committee for Civil Rights, and with the national ACLU's prison project.

Since law school, Corina has further honed her litigation skills – and has continued her efforts on behalf of incarcerated people – as an Equal Justice Works Fellow at the Center for Appellate Litigation in New York, working to obtain postconviction relief for survivors of domestic violence. Corina is a talented young lawyer with a track record of striving for social justice. She is a lovely person who will be a delight to work with and who will get along well with everyone in chambers. I recommend her very highly. Please do not hesitate to let me know if there is any other information that would be useful to you.

Sincerely,

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Writing Sample

The attached writing sample is excerpted from a brief I drafted for Penn Law's flagship appellate advocacy competition: the Keedy Cup. My partner and I briefed *American Hospital Association v. Xavier Becerra*, then pending before the Supreme Court, on behalf of the Petitioner. My partner briefed the jurisdictional issue in the case, and I briefed the *Chevron* issue.

This sample is excerpted to contain only my section of the brief. I was not permitted to rely on any outside materials, including materials submitted to the Supreme Court. This brief is solely my own work and has not been edited by anyone else.

QUESTION PRESENTED

Whether *Chevron* deference permits the Secretary of Health and Human Services (HHS) to set Medicare reimbursement rates based on acquisition cost and vary rates by hospital group if it has not collected hospital acquisition cost survey data.

FACTUAL BACKGROUND

Under 42 U.S.C. § 1395l(t)(14)(A)(iii), Congress authorized the Secretary of HHS to set Medicare reimbursement rates for certain hospitals according to two alternate formulas. Under subclause (I), if HHS collects Congressionally specified hospital acquisition cost survey data, it must set reimbursement rates according to "*the average acquisition cost* for the drug for that year ... as determined by the Secretary taking into account the hospital acquisition cost survey data" and HHS must vary reimbursement rates by hospital group. However, if the survey data is unavailable, the agency must set reimbursement amounts under subclause (II) using the drug's average sales price (ASP) drawn from data that drug manufacturers submit to HHS every quarter. Subclause (II) provides for the ASP to be "adjusted ... as necessary for purposes of this paragraph" but, unlike subclause (I), grants no authority to vary the reimbursement rates by hospital group.

In 2012, HHS concluded it could not obtain the acquisition cost survey data Congress required to reimburse hospitals under subclause (I), thus HHS adopted the ASP reimbursement method under subclause (II). HHS applied the ASP rate without further adjustments for each subsequent year until January 1, 2018. In mid-2017, HHS proposed reducing the Medicare reimbursement rates from ASP plus 6% to ASP minus 22.5%, ostensibly acting under the "adjustment" authority found in subclause (II). HHS admitted that its reason for proposing this reduction was that a lower reimbursement rate would better reflect the acquisition cost of the drugs. However, HHS did not have the data subclause (I) required to calculate reimbursement rates

according to acquisition costs. Contrary to the statutory formula, HHS estimated hospitals' drug acquisition costs based on hospitals' average discount from the 340B program, reducing reimbursement rates by nearly 30%.

ARGUMENT

I. *CHEVRON* DEFERENCE DOES NOT PERMIT HHS TO SET REIMBURSEMENT RATES BASED ON ACQUISITION COST AND VARY SUCH RATES BY HOSPITAL GROUP IF IT HAS NOT COLLECTED THE STATUTORILY SPECIFIED HOSPITAL ACQUISITION COST SURVEY DATA.

Under *Chevron* step-one, the plain text of the statute forecloses HHS's interpretation of its adjustment authority. Congress spoke clearly when it established two alternate statutory calculations to set reimbursement rates, thus no additional implied delegation of authority to alter reimbursement rates or the underlying data requirements can be read into the statute. Similarly, vague references to the statute's general purpose do not expand the delegation of authority because Congress explicitly delineated the boundaries of the agency's authority. Even if the Court reaches *Chevron* step-two, no deference is owed because the Secretary's interpretation is unreasonable. An agency cannot construe a statute to nullify the textually applicable provision meant to limit the agency's discretion. Unlike subclause (I), subclause (II) omits agency authority to vary reimbursement rates by hospital group, which limits the Secretary's regulatory discretion. Further, the Secretary's interpretation is unreasonable because he impermissibly read subclause (I) out of the statute to permit HHS to do under subclause (II) what it could not do under subclause (I) without the requisite data.

A. HHS's Interpretation of Subclause (II) is Foreclosed by the Plain Terms of the Text Because Congress Provided Two Explicit Formulas to Calculate Reimbursement.

The Secretary's interpretation of subclause (II) is foreclosed at *Chevron* step-one because Congress provided the agency with two explicit, alternative formulas by which the agency was authorized to set reimbursement rates, yet the Secretary created a third formula in violation of the

plain terms of the statutory text. Under step one of *Chevron*, the court must first determine whether Congress has directly spoken to the precise question at issue. *Chevron*, 467 U.S. at 842. If Congress has done so, the inquiry is at an end. *Id*. at 842-43. Agencies exercise discretion only in the interstices created by statutory silence or ambiguity. *Id.* at 843; *see also Nat'l Ass'n. of Home Builders v. Def's. of Wildlife,* 551 U.S. 644, 665 (2007). In the absence of silence or ambiguity, the Court must always give effect to the unambiguously expressed intent of Congress. *Chevron*, 467 U.S. at 843. In this case, Congress unambiguously delineated the scope of HHS's authority to set reimbursement rates by establishing two explicit, mutually exclusive calculation formulas. HHS ignored the formulas and created a new, unauthorized formula which went well beyond what the plain text of the statute could bear.

1. *Explicit Congressional Delegation of Authority Precludes an Implicit Delegation More Expansive than Congress's Express Terms.*

Congress spoke clearly when it established two, detailed statutory calculations to set reimbursement rates, thus no additional implied delegation of authority to alter reimbursement rates can be read into the statute. The authority of administrative agencies is inherently constrained by the language of the statute they administer. *See Massachusetts v. EPA,* 549 U.S. 497 (2007). An agency has no power to "tailor" legislation to bureaucratic policy goals by rewriting unambiguous statutory terms. *Util. Air Reg. Group,* 573 U.S. at 328 (holding that the EPA lacked authority to "tailor" the Act's unambiguous numerical thresholds to accommodate the Agency's greenhouse-gas-inclusive interpretation because an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate). The power to execute the laws does not include a power to revise clear statutory terms that turn out not to work in practice. *Id.*; *see also Barnhart v. Sigmon Coal Co.,* 534 U.S. 438, 462 (2002) (finding that an agency lacked authority to develop new guidelines or to assign liability in a manner inconsistent with an

unambiguous statute). In this case, Congress established precise formulas through which HHS was required to set reimbursement rates. Nonetheless, HHS maintains that the "calculate" and "adjust" provision in Paragraph 14 renders the rate-setting ambiguous.

The two formulas found in subclauses (I) and (II) operate as alternatives, and the adjustment authority does not confer authority to conflate or alter the explicit methodology set by Congress. When Congress specifically addresses the circumstances under which secretarial authority can be exercised and those circumstances are absent, no implicit delegation of additional authority can be read into the statute. *See Texas v. U.S.*, 497 F.3d 491, 503 (5th Cir. 2007) (holding that the Secretary may not "pull out of thin air" the compact provisions that he is empowered to enforce: "to infer from this limited statutory authority that the Secretary was implicitly delegated the ability to promulgate a wholesale substitute for the judicial process amounts to what the court characterized as 'logical alchemy.'"); s*ee also Backcountry Against Dumps v. EPA,* 100 F.3d 147, 151 (D.C. Cir. 1996) (finding that explicit congressional delegation of authority precludes an implicit delegation more expansive than Congress's express terms). The comprehensiveness of an explicit statutory scheme belies the assertion that it gives rise to an implicit delegation of virtually unlimited authority. *Roselli v. Noel,* 414 F. Supp. 417, 424 (D.R.I. 1976); *see also Hays v. Leavitt,* 583 F. Supp. 2d 62 (D.D.C. 2008) (finding that Congress, having minutely detailed the reimbursement rates for covered items and services, could not have intended that the Secretary could ignore these formulas whenever she determined that the expense of an item or service was not reasonable or necessary).

Here, Congress explicitly and unambiguously delineated when and how Congress intended that HHS pursue acquisition-cost based reimbursement. Congress gave HHS a specific formula—subclause (I)—which provides that HHS may only set the rates according to hospital acquisition

costs if it has collected congressionally specified data. It is uncontested that HHS has never collected the hospital acquisition cost data that the statute contemplates. Nonetheless, the Secretary misused his authority under subclause (II) to set hospital reimbursement rates in the manner that subclause (I) authorizes, but without collecting and considering the specific data that subclause (I) requires. Without the hospital-specific cost data provided in subclause (I), weighty financial decisions that differentiate among hospital groups could be based on considerably less precise information, potentially impacting their accuracy. The Secretary's limited authority to choose between two congressionally specified reimbursement formulas does not constitute an implicit delegation of authority to develop a third formula "out of thin air" that circumvents the explicit data-requirement that subclause (I) requires. The Secretary violated the plain and unambiguous formula in the Medicare statute when he calculated rates based not on the drugs' average sales price—as dictated by the statutory text—but on the drugs' estimated acquisition costs.

2. Vague References to a Statute's Purpose Do Not Justify Deviating from the Plain Language of the Statutory Text.

Delegation of authority cannot be inferred from bypassing the plain text of the statute and instead invoking the overarching purpose of the statute, especially when Congress has explicitly delineated the boundaries of the delegated authority. *Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC,* 962 F.2d 27, 33 (D.C. Cir. 1992). HHS claims that the rate adjustment brought reimbursement into alignment with the broader purpose of the statute, which is to reimburse hospitals for acquisition costs. *See* JA 135 ("The majority argues, based primarily on the text of subclause (I) and other provisions in the OPPS statute, that Congress's primary goal is to reimburse providers for their acquisition costs.") It is well-established, however, that "vague notions of a statute's 'basic purpose' are … inadequate to overcome the words of its text." *Mertens v. Hewitt Assoc's.,* 508 U.S. 248, 261 (1993); *see also Rodriguez v. United States,* 480 U.S. 522,

526 (1987) (per curiam) ("[I]t frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law."). This Court has repeatedly established the supremacy of plain text in statutory construction: "the language of the statute controls when sufficiently clear in its context." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 201 (1976). Where, as here, the underlying statute "limits a thing to be done in a particular mode, it includes the negative of any other mode." *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers,* 414 U.S. 453, 458 (1974). Accordingly, administrative agencies and the courts are "bound, not only by the ultimate purposes Congress has selected *but by the means it has deemed appropriate,* and prescribed, for the pursuit of those purposes." *MCI Telecomm. Corp.,* 512 U.S. at 231 n. 4 (1994) (emphasis added).

HHS is bound by the explicit means Congress prescribed to pursue the broader purpose of the Medicare statute. HHS claims that the manifest purpose of paragraph 14, and the statute more broadly, is to compensate providers for the average acquisition cost of certain covered drugs, thus authorizing HHS to reduce reimbursement rates to ASP minus 22.5 percent to "better align" with hospitals' acquisition costs. JA 122. However, paragraph (14) specifically delineates when and how HHS can pursue acquisition-cost-based reimbursement. HHS erroneously invoked the purpose of subclause (I) to justify circumventing the statutory mandate in subclause (II). It is true that §(t)(14)(A)(iii) authorizes the Secretary to set reimbursement rates at levels consistent with acquisition costs for specified drugs, but that authorization is only found in subclause (I), which requires the Secretary to consider certain hospital acquisition cost survey data. If Congress wanted HHS to merely do its best to approximate those costs and then vary them by hospital groups, Congress would have included only one formula. Because Congress explicitly established two separate formulas, a vague reference to the purpose of subclause (I) does not confer an implicit

delegation of authority to create a third formula based neither on acquisition costs nor average sales price. The statutory scheme is clear: if hospital acquisition cost data is not available, the Secretary must calculate reimbursement rates according to subclause (II). While the purpose of subclause (I) is to reimburse hospitals for acquisition costs, that purpose cannot be extracted to override the plain text of subclause (I) and (II), which specifies exactly when and how the agency can set reimbursement rates according to acquisition costs.

B. No Deference is Owed Even If the Court Reaches Step Two Because the Secretary's Interpretation Nullified the Provision Limiting Agency Discretion and Intentionally Circumvented the Stringent Data Requirements Congress Set Forth in Subclause (I), Which is Patently Unreasonable Under *Chevron*.

HHS's interpretation was unreasonable because the Secretary nullified textually applicable provisions meant to limit the agency's discretion and the Rule was designed as an end-run around Congress's carefully crafted scheme. Under step two of *Chevron*, the Court asks whether the agency's interpretation was reasonable. *Chevron*, 467 U.S. at 844; *City of Arlington v. F.C.C.,* 569 U.S. 290, 297 (2013) (holding that agencies empowered to resolve statutory ambiguities must operate "within the bounds of reasonable interpretation.") Agency interpretations that are untethered to Congress's plain text approach are unreasonable at *Chevron* step two. *Nat. Res. Def. Council v. EPA.*, 777 F.3d 456, 469 (D.C. Cir. 2014). Agency expertise in administering a technical and complex regulatory scheme is a factor bearing on whether the agency's interpretation of an ambiguous statute is reasonable, although it is irrelevant if the interpretation is inconsistent with the statutory language. *Bd of Governors of Fed. Reserve System v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986) (holding that no amount of agency expertise—however sound the result may be—could support an agency interpretation inconsistent with the statutory language).

An agency interpretation is unreasonable if the agency construes the statute in a way that completely nullifies textually applicable provisions meant to limit the agency's discretion.

Whitman, 531 U.S. 457, 485 (2001). In *Whitman v. American Trucking Association,* the EPA revised the national ambient air quality standards for ozone. Subpart 1 of the relevant statute permitted the EPA to establish classifications for nonattainment areas, but subpart 2 classified areas, including ozone, as matter of law based on a table. *Id*. at 484. In promulgating a rule under subpart 1, the Court found that the EPA bypassed the requirements of subpart 2 which dictated standards for ozone specifically. The Court explained that the principal distinction between subpart 1 and subpart 2 was that subpart 2 eliminated regulatory discretion that subpart 1 allowed. *Id*. The Court held that the use of a few apparent gaps in subpart 2 to render its textually explicit applicability to nonattainment areas under the new standard utterly inoperative was to go "over the edge of reasonable interpretation." *Id*. at 485. While recognizing the existence of gaps in subpart 2, the Court emphasized their narrow scope: the EPA was not to render subpart 2's "carefully designed restrictions on EPA discretion utterly nugatory," nor could it "construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion." *Id.* at 484-86; *see also South Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 900 (D.C. Cir. 2006) (finding the EPA's interpretation unreasonable because Congress purposely crafted certain provisions to limit agency discretion in certain areas of the statutory scheme and the interpretation attempted to nullify these provisions).

Whitman plainly controls here: the Secretary's reading of the statute impermissibly nullifies subclause (I) and the data requirements spelled out at length in subparagraph (D). *See* 42 U.S.C. § 1395*l*(t)(14)(D). Just as ozone was classified as a matter of law in *Whitman*, and thus the only authority to regulate it was found in subpart II, reimbursement according to acquisition cost was classified as a matter of law, and in the absence of precise survey data, the agency only had authority to set rates under subclause (II). The principal distinction between subclause (I) and

subclause (II) is that subclause (II) eliminates regulatory discretion that subclause (I) allows. Under subclause (I), Congress granted HHS regulatory discretion to vary reimbursement rates by hospital group *if and only if* the Secretary gathered hospital acquisition cost survey data.[1] In the absence of this data, the Secretary is required to set reimbursement rates under subclause (II), which explicitly limits HHS's regulatory discretion by omitting authority to vary rates by hospital group. It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another. *See City of Chicago v. Envt'l. Def. Fund*, 511 U.S. 328, 338 (1994). Subclause (II) omits authority to vary reimbursement rates by hospital group and thus limits the Secretary's regulatory discretion. Because the agency cannot construe the statute to nullify subclause (II), which was purposely designed to limit agency discretion, the Secretary's interpretation is unreasonable.

Further, agency rules that are designed as an end-run around Congress's carefully crafted statutory scheme are unreasonable under *Chevron. New York v. United States Dep't of Labor,* 363 F. Supp. 3d 109 (D.D.C. 2019). In *New York v. U.S. Dep't of Labor*, the court vacated a rule promulgated by the Department of Labor (DOL) which allowed self-employed people to join associations that provided group health insurance plans like those offered by employers. *Id.* at 136-37. The Secretary of Labor confirmed the Final Rule was designed to expand access to group health plans in order to avoid the most stringent requirements of the ACA. *Id.* at 117. The court held that the DOL rule was designed as an end-run around the Affordable Care Act (ACA) and the Employee Retirement Income Security Act (ERISA) because Congress did not intend for ERISA to regulate commercial healthcare insurance providers directly or to expand citizen access to

[1] *See* 42 U.S.C. § 1395*l*(t)(14)(D)(i)-(ii) (specifying in detail how the "[a]cquisition cost survey for hospital outpatient drugs" is to be conducted, first by the Government Accountability Office (GAO) and later by HHS, after that agency has "tak[en] into account" the Comptroller General's "recommendations" as to the "frequency and methodology of subsequent surveys.")

healthcare benefits outside of employment relationships. *Id.* at 117, 128. Because the rule purported to extend ERISA to cover what was essentially commercial insurance transactions between unrelated parties, the Final Rule exceeded the statutory authority delegated by Congress in ERISA and thus was an unreasonable interpretation of federal law under *Chevron*. *Id*. at 141.

In this case, the Secretary has two options: gather the required data to establish payment rates according to acquisition costs or express his disagreement with Congress, but the Secretary may not end-run Congress's clear mandate. HHS impermissibly substituted its own policy judgment for that of Congress, which undermined the carefully crafted statutory scheme. Like the DOL's Final Rule, which was designed to avoid the most stringent requirements of the ACA, the Secretary's reimbursement formula circumvents subclause (I)'s stringent data requirements by using the adjustment provision in subclause (II) to set reimbursement rates according to the method set forth in subclause (I), but without acquiring the data that subclause (I) requires. The Secretary's interpretation constitutes an end-run around Part B of the Medicare statute because it conflates the two formulas to avoid the data requirement, which is patently unreasonable under *Chevron*.

Ultimately, the facts of this case yield no justification to depart from this Court's prior holdings, which expressly reject the proposition that incorporation of an "adjustment provision" renders an otherwise unambiguous statutory formula, ambiguous. HHS is bound by Congress's explicit articulation of one dispositive factor that determines whether subclause (I) or subclause (II) can be used: the presence or absence of the requisite survey data. Without the statutorily mandated survey data, HHS's regulatory discretion is significantly constrained and the agency's authority to set Medicare reimbursement rates is confined solely to subclause (II).

Applicant Details

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Applicant Education

BA/BS From	**College of William and Mary**
Date of BA/BS	**May 2014**
JD/LLB From	**University of Virginia School of Law** **http://www.law.virginia.edu**
Date of JD/LLB	**May 19, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Virginia Law Review** **Virginia Environmental Law Journal**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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June 12, 2023

The Honorable Juan R. Sánchez
U.S. District Court, E.D. Pa.
James A. Byrne U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Dear Chief Judge Sánchez:

I am a rising third-year law student at the University of Virginia School of Law, and I am writing to you to apply for a clerkship in your chambers. I expect to receive my J.D. in May 2024 and will be available to work any time after that.

I was born in southeastern Pennsylvania and I am interested in returning upon my graduation from law school. Therefore, I would love to begin my legal career with a clerkship in Pennsylvania.

Enclosed please find a copy of my resume and my most recent transcript. I have also enclosed as a writing sample a memorandum that I wrote for an attorney at the Department of Justice last summer, forwarded to you with his and his Section's permission. Finally, included are letters of recommendation from Professor Jaffe (434-924-4776) and Professor Barzun (434-924-6454).

If you have any questions or need to contact me for any reason, please feel free to reach me at the above address and telephone number. Thank you very much for considering me.

Sincerely,

Christopher Seiler

Christopher D. Seiler

293 Peyton Ct Apt 3, Charlottesville, VA 22903 • (804) 767-0711 • ndb3uz@virginia.edu

EDUCATION

University of Virginia School of Law, Charlottesville, VA
J.D., Expected May 2024, 3.69 GPA

- *Virginia Law Review*, Editorial Board
- *Virginia Environmental Law Journal*, Managing Editor
- Program in Law and Public Service, Fellow
- Public Interest Law Association, Distinguished Member
- Environmental Law and Community Engagement Clinic, Fall 2022

Virginia Polytechnic Institute and State University, Blacksburg, VA
M.A., Political Science, May 2020

College of William and Mary, Williamsburg, VA
B.A., International Relations, *summa cum laude*, May 2014

EXPERIENCE

United States Senate Office of the Legislative Counsel, Washington, DC
Law Clerk, May 2023 – July 2023

United States Department of Justice, Civil Division, Washington, DC
Intern, Fraud Section, May 2022 – July 2022

- Drafted memorandum on defective pricing under the Truth in Negotiations Act as a basis for a claim under the False Claims Act
- Researched substantive and procedural issues for ongoing litigation under the False Claims Act including medical necessity, government knowledge defense, and deliberative process privilege

United States Air Force/Air Force Reserve, Multiple Locations
Intelligence Officer, March 2016 – Present

- Leads 35-member unit in conducting multiple intelligence missions and develops training programs to ensure continued readiness over drill weekends
- Directed 18-member analysis team on 782 full motion video intelligence missions and served as the primary full motion video analysis instructor, training nine officers
- Briefed aircrews daily and the Wing Commander weekly on current threats and provided original threat assessments based on research and analysis of multiple classified and unclassified sources
- Served as the interim Chief of Wing Intelligence, ensuring seamless continuation of intelligence support to senior leaders and overseeing 12 members of the Intelligence flight

Arlington Primary Care, Arlington, VA
Data Quality Analyst, August 2014 – March 2016

- Identified, reviewed, and corrected data inconsistencies in patient charts in the electronic medical records system, including adding new information and evaluating information for accuracy

The Stimson Center, Washington, DC
Intern, Budgeting for Foreign Affairs and Defense, January 2014 – August 2014

- Provided research support on the costs of American nuclear weapons programs for an article appearing in *Foreign Affairs*

INTERESTS

Reading history, running, historic and cultural sites (*e.g.*, museums, preserved areas), classic movies

UNIVERSITY OF VIRGINIA
SCHOOL OF LAW

Name: Christopher Seiler

Date: June 07, 2023
Record ID: ndb3uz

This is a report of law and selected non-law course work (including credits earned). This is not an official transcript.

Due to the global COVID-19 pandemic, the Law faculty imposed mandatory Credit/No Credit grading for all graded classes completed after March 18 in the spring 2020 term.

		FALL 2021			
LAW	6000	Civil Procedure	4	A-	Solum,Lawrence
LAW	6002	Contracts	4	B+	Hellman,Deborah
LAW	6003	Criminal Law	3	A-	Jeffries Jr.,John C
LAW	6004	Legal Research and Writing I	1	S	Fore Jr.,Joe
LAW	6007	Torts	4	A-	Cope,Kevin
		SPRING 2022			
LAW	6001	Constitutional Law	4	A-	Mahoney,Julia D
LAW	6112	Environmental Law	3	A-	Livermore,Michael A.
LAW	7088	Law and Public Service	3	A-	Kim,Annie
LAW	6005	Lgl Research & Writing II (YR)	2	S	Fore Jr.,Joe
LAW	6006	Property	4	A-	Hynes,Richard M
		FALL 2022			
LAW	8640	Enviro and Comm Eng Clinic	4	A-	Jaffe,Caleb Adam
LAW	6104	Evidence	4	A-	Barzun,Charles Lowell
LAW	6105	Federal Courts	4	A	Ahdout,Zimra Payvand
LAW	7071	Professional Responsibility	3	B+	Mitchell,Paul Gregory
		SPRING 2023			
LAW	6102	Administrative Law	4	A-	Bamzai,Aditya
LAW	9341	Law of Corruption	3	A-	Gilbert,Michael
LAW	7062	Legislation	4	A-	Nelson,Caleb E
LAW	9197	Public Utility Reg Seminar	3	A	Gocke,Alison

June 09, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing to offer my very enthusiastic recommendation for Chris Seiler, who has applied for a clerkship in your chambers. I met Chris when he was a first-year law student, after he reached out to me to learn about career paths in environmental law. I was immediately struck by his maturity, focus, and humility. We enjoyed several productive discussions during Chris's 1L year, conversing about his public-interest aspirations and covering environmental law and policy topics more generally.

I came to know Chris much better after he applied to join the Environmental Law and Community Engagement Clinic for the Fall 2022 semester. Chris immediately stood out as a thoughtful, team-oriented member of the Clinic. He especially excelled on projects with the Southern Environmental Law Center ("SELC"), a longstanding partner of the UVA Clinic. The students I select to work on SELC projects need to be independent and self-motivated. Chris was a perfect fit for that kind of work. Given his experience as an intelligence officer for the U.S. Air Force, Chris was unquestionably ready to assume many of the responsibilities of a lawyer. Simply put, Chris needs less day-to-day oversight than is often required of his peers.

Over the course of the Fall 2022 semester, Chris proved to be one of the strongest researchers and writers in the Clinic. He completed several complex assignments across a broad range of cases: federal and state takings jurisprudence as it applied to abandoned public property; state constitutional questions on mining law; and a multi-state survey of legal regimes on low carbon fuel standards. Without fail, Chris's memos were carefully researched, thoughtfully presented, well-written, and clearly argued. The attorneys at SELC who worked directly with Chris shared with me that they had immense confidence in the quality of Chris's work.

I should add that Chris was a stellar contributor during the seminar portion of our Clinic, when we would discuss all of the students' projects in addition to debating the supplemental readings that I would assign. Chris was a steady contributor and respectful listener during these sessions.

And Chris' star continues to rise. He earned an impressive 3.76 GPA in the Spring 2023 term, while continuing to manage his responsibilities both for the Virginia Law Review and the Virginia Environmental Law Journal.

If I had to come up with one word to describe Chris, it would be "unflappable." Chris carries himself calmly and acts patiently. He is kind and gracious. Because of these traits, I have no doubt that he would be an excellent colleague to have in chambers. I would hire him in a minute.

Sincerely,

Cale Jaffe
Professor of Law, General Faculty
Director, Environmental Law & Community Engagement Clinic

Caleb Jaffe - cjaffe@law.virginia.edu - (434) 924-4776

June 08, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write to recommend highly Christopher Seiler for a clerkship in your chambers. Chris is a bright young man, who I think would make a terrific clerk in your chambers.

I got to know Chris the fall of his second year when he enrolled in my Evidence class. I teach Evidence in a fairly traditional way, using a combination of Socratic method, lecture, and voluntary class discussion. Chris's class had only 46 students in it, which was much smaller than my typical Evidence class because it was in the fall and so had no first-year students. That fact meant that I got to know the students more quickly than I normally do. Chris impressed me throughout the semester. Whenever I called on him, he demonstrated that he had done the reading and thought about the problem or case under discussion. I was thus not surprised that he did well on the final exam, earning an A- for the course.

Chris's performance in my classes has been typical of his law-school performance overall. After two years, he has a GPA of 3.69, which places him well within the top 20% of his law-school class. Even more impressive, he has put together that record while throwing himself into the intellectual and extracurricular life of the law school. He is a fellow in the Program in Law and Public Service, a member of the Public Interest Law Association, and works on two journals: He's an Article Editor for the Virginia Environmental Law Journal and is an editorial board member of the Virginia Law Review.

I believe that Chris wants to practice environmental law, ideally working at the EPA or some other regulatory agency. I have every reason to believe he will find success in doing so. Chris is a few years older than most of his classmates, having served in the Air Force for several years after college, and he displays the maturity and intelligence one would expect of someone with such a background. For those reasons, I think he will make a great judicial clerk. Still, if you have any questions about Chris, or would like to discuss his candidacy any further, please do not hesitate to email me (cbarzun@virginia.edu) or call me at any time (434-924-6454), and I will call you back at your convenience.

Sincerely,

Charles L. Barzun

Christopher D. Seiler

293 Peyton Ct Apt 3, Charlottesville, VA 22903 • (804) 767-0711 • ndb3uz@virginia.edu

Writing Sample

This writing sample is a memorandum that I wrote during my summer internship in the Fraud Section, Civil Division. In this memorandum, I respond to an attorney's question as to whether and how a false certification under the Truth in Negotiations Act can serve as the basis for an action under the False Claims Act. This writing sample is my own work product and has not been substantially edited by any other person. I received permission from the Fraud Section and the supervising attorney to use this piece as a writing sample.

MEMORANDUM

TO: Art Coulter
Senior Trial Counsel
Fraud Section

FROM: Chris Seiler
Intern
Fraud Section

RE: TINA Violations and FCA Liability

I. TINA and the FCA establish liability for certain fraudulent behaviors while contracting with the government

A. TINA requires contractors to certify that their cost and pricing data is accurate

Contractors that provide defective cost or pricing data to the government may be liable for price adjustments to contracts made based on the defective data. The Truthful Cost or Pricing Data Act, also known by its former name, the Truth in Negotiations Act (TINA), defines "cost or pricing data" as "all facts that, as of the date of agreement on the price of a contract . . . a prudent buyer or seller would reasonably expect to affect price negotiations significantly." 10 U.S.C. § 3701.[1] "Cost or pricing data" does not include information that is judgmental, but it does include the "factual information from which a judgment was derived." *Id.* Cost or pricing data includes historical accounting data, vendor quotations, nonrecurring costs, information on changes in production methods and in production or purchasing volume, data underlying projections of business prospects and objectives, unit-cost trends, make-or-buy decisions, and information on management decisions that could have a significant bearing on costs. 48 C.F.R. § 2.101. One court held that eight months' worth of performance data at a facility to which a contractor was moving production that demonstrated the workforce there was more efficient than projected and thus the number of required labor hours was inflated constituted cost or pricing data. *United States ex rel. Campbell v. Lockheed Martin Corp.*, 282 F. Supp. 2d 1324, 1335 (M.D. Fla. 2003).

Under TINA, contractors must "certify that, to the best of the [contractor]'s knowledge and belief, the cost or pricing data submitted are accurate, complete, and current." 10 U.S.C. § 3702(b). Thus, defective cost or pricing data is that which is "inaccurate, incomplete, or noncurrent." 10 U.S.C. § 3706(a)(2). Contracts "shall be adjusted to exclude any significant amount" by which the price was increased because a contractor submitted defective cost or

[1] Formerly 10 U.S.C. § 2306a, TINA's provision were transferred to 10 U.S.C. §§ 3701–3708 effective January 1, 2022, and § 2306a was repealed. *See* William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 1831, 134 Stat. 3388, 4209–17 (2021). TINA also includes 41 U.S.C. §§ 3501–3509, which features similar language and applies more broadly than the provisions in Title 10 that are specific to the armed forces.

pricing data. 10 U.S.C. § 3706(a)(1). This verbiage is repeated verbatim in 41 U.S.C. §§ 3501(a)(1), 3502(b), 3506(a)(2), and 3506(a)(1), respectively. The requirement to provide cost or pricing data and the accompanying certifications to their accuracy are required before a contract is awarded if the price of the contract is expected to exceed $2,000,000, or $750,000 if the contract was entered into on or before June 30, 2018. 10 U.S.C. § 3702(a)(1); 41 U.S.C. § 3502(a)(1).[2]

1. The government has the burden of proof and must demonstrate cost or pricing data was not disclosed and the government detrimentally relied upon defective data

The government has the burden of proof in a defective pricing case, and it must prove by a preponderance of the evidence that: (1) the information at issue is "cost or pricing data" under TINA; (2) the cost or pricing data was not disclosed, or was not meaningfully disclosed,[3] to a proper government representative; and (3) the government detrimentally relied on the defective data and shows by some reasonable method the amount by which the final negotiated amount was overstated. *Campbell*, 282 F. Supp. 2d at 1332 (quoting *United States v. United Techs. Corp., Sikorsky Aircraft Div.*, 51 F. Supp. 2d 167, 189 (D. Conn. 1999)). Once it is determined that a contractor provided defective data, there is a rebuttable presumption that the non-disclosure of data resulted in an overstatement of the price of the contract. *Wynne v. United Techs. Corp.*, 463 F.3d 1261, 1263 (Fed. Cir. 2006). If that presumption is rebutted, "the government can only prevail upon proof that it relied upon the defective data to its detriment in agreeing to the contract price." *Id.* Additionally, the government can receive double damages if it shows the submission of defective data was a "knowing submission." 10 U.S.C. § 3707(a)(2); 41 U.S.C. § 3507(a)(2).

B. The FCA provides punitive measures for false claims for payment and false statements material to false claims

The False Claims Act (FCA) provides penalties for any person who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval," 31 U.S.C. § 3729(a)(1)(A), or who "knowingly makes, uses, or causes to be made or used, a false record or

[2] Congress claimed that the higher thresholds for certified cost and pricing data will reduce administrative burdens, improve process timelines for smaller contracts, and make thresholds approximately consistent with standard auditing thresholds. H.R. Rep. No. 115-200, at 163 (2017). Additionally, legislation introduced in June 2022 would, among other things, amend 10 U.S.C. § 3702(a)(1) to expand the requirement to submit cost or pricing data from instances in which only one bid is expected to also include instances "for which award of a cost-reimbursement contract is contemplated regardless of the number of offers received." Stop Price Gouging the Military Act, S. 4374, 117th Cong. § 2(a) (2022).

[3] "A determination of whether a data disclosure was meaningful depends on the application of a 'rule of reason' to the circumstances of each case to determine whether the data was conveyed to the Government in a reasonably meaningful fashion." *Aerojet Ordnance Tennessee*, ASBCA No. 36089, 95-2 B.C.A. ¶ 27,922 at 139,437 (quoting *Plessey Industries*, ASBCA No. 16720, 74-1 BCA ¶ 10,603). Put differently, the government must show the data was not provided in a "usable, understandable format" to the proper government representative. *Id.* (citing *Litton Sys., Inc., Amecom Div.*, ASBCA No. 36509, 92-2 B.C.A. ¶ 24842); *see also Sylvania Elec. Prod., Inc. v. United States*, 479 F.2d 1342, 1348 (Ct. Cl. 1973) (stating that TINA can only be effective if the government is "clearly and fully informed" which requires "complete disclosure of the item or items in question").

statement material to a false or fraudulent claim." 31 U.S.C. § 3729(a)(1)(B). Violations of the FCA result in a civil penalty plus treble damages. 31 U.S.C. § 3729(a)(1).

1. The FCA defines know, claim, and material but not false or fraudulent

The FCA defines "know" and "knowingly" as, with respect to information, "has actual knowledge of the information; acts in deliberate ignorance of the truth or falsity of the information; or acts in reckless disregard of the truth or falsity of the information." 31 U.S.C. § 3729(b)(1)(A). Knowledge requires no proof of a specific intent to defraud the government. 31 U.S.C. § 3729(b)(1)(B). A "claim" under the FCA is "any request or demand . . . for money or property" that is "presented to an officer, employee, or agent of the United States" or is "made to a contractor, grantee, or other recipient" if the money or property is to be used on behalf of the government. 31 U.S.C. § 3729(b)(2)(A). Finally, "material" is defined as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." 31 U.S.C. § 3729(b)(4). The text of the FCA does not define "false" or "fraudulent" but the Supreme Court interprets those terms under their "well-settled" common-law meanings. *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 579 U.S. 176, 187 (2016).

2. The government has the burden of proof and must show falsity, scienter, and materiality

The elements that must be shown in an FCA case may differ slightly depending on whether the case is brought under Section 3729(a)(1)(A) or 3729(a)(1)(B). In a presentment case under Section 3729(a)(1)(A), the government, or a relator in a *qui tam* suit, must show "(1) the defendant submitted or caused to be submitted a claim to the government, (2) the claim was false, and (3) the defendant knew the claim was false." *United States ex rel. Groat v. Bos. Heart Diagnostics Corp.*, 255 F. Supp. 3d 13, 21 (D.D.C.), *amended on reconsideration in part*, 296 F. Supp. 3d 155 (D.D.C. 2017). In a false statements case under 3729(a)(1)(B), it must be shown that "(1) the defendant made or used [or caused to be made or used] a 'record or statement;' (2) the record or statement was false; (3) the defendant knew it to be false; and (4) the record or statement was 'material' to a false or fraudulent claim." *Id.* at 30. Thus, cases brought under both Sections require a showing of a false claim or statement known by the defendant to be false. False statement cases also require a showing of materiality. The common law proximate causation test is used for determining liability and damages in FCA cases. *See, e.g.*, *United States v. Luce*, 873 F.3d 999 (7th Cir. 2017).

3. Several circuits have adopted a threshold scienter requirement from *Safeco*

To date, six circuits have held that the Supreme Court's interpretation of the Fair Credit Reporting Act's (FCRA) scienter requirement in *Safeco* applies to the FCA. *United States ex rel. Sheldon v. Allergan Sales, LLC*, 24 F.4th 340, 347 (4th Cir. 2022) (citing *Safeco Insurance Company of America v. Burr*, 551 U.S. 47 (2007) as well as cases from the Third, Seventh, Eighth, Ninth, and D.C. Circuits), *reh'g en banc granted*, No. 20-2330, 2022 WL 1467710 (4th Cir. May 10, 2022). *Safeco* created a two-step process for analyzing reckless disregard: first,

determining whether the defendant's interpretation of the relevant statute was objectively reasonable and then asking whether determinative guidance exists that might have warned the defendant away from its interpretation. *Id.* Thus, a defendant cannot act "knowingly" if it "bases its actions on an objectively reasonable interpretation of the relevant statute when it has not been warned away from that interpretation by authoritative guidance." *Id.* at 348. This objective standard also precludes inquiry into a defendant's subjective intent. *Id.* However, *Safeco* only applies to legally false claims, which "generally require knowingly false certification of compliance with a regulation or contractual provision as a condition of payment" and "involve contested statutory and regulatory requirements." *Id.* at 349–50 (contrasting legally false claims with factually false ones, such as those involving incorrect descriptions of goods or services or claims for goods or services not provided).

4. Materiality is generally required in an FCA case

31 U.S.C. § 3729(a)(1)(B) requires that the false record or statement be "material" to a false or fraudulent claim. 31 U.S.C. § 3729(a)(1)(B). Although the text of § 3729(a)(1)(A) does not mention materiality, the Supreme Court has held that, regarding that section, what matters is "whether the defendant knowingly violated a requirement that the defendant knows is material to the Government's payment decision." *Escobar*, 579 U.S. at 181, 193 (declining to decide whether "§ 3729(a)(1)(A)'s materiality requirement is governed by § 3729(b)(4) or derived directly from the common law"). Thus, many courts require proof that knowingly false claims be material to the government's payment decision for an FCA claim to succeed, especially following *Escobar*. *See, e.g.*, *United States ex rel. Loughren v. Unum Grp.*, 613 F.3d 300, 307 (1st Cir. 2010); *United States ex rel. Feldman v. van Gorp*, 697 F.3d. 78, 86 n.5 (2d Cir. 2012) (noting the Second Circuit had not required a showing of materiality prior to a 2009 amendment to the FCA that added the materiality language to § 3729(a)(1)(B) and imposing that requirement on § 3729(a)(1)(A)); *United States ex rel. Schutte v. SuperValu Inc.*, 9 F.4th 455, 463 (7th Cir. 2021).

II. TINA violations can serve as the basis of an FCA claim

TINA and the FCA both involve misrepresentations made to the government, although the burdens of proof differ between the two. TINA requires a showing that cost or pricing data was not disclosed, or was not meaningfully disclosed, and that the government relied on the defective data. The government also may need to show causation if the contractor offers evidence the government did not rely on the defective data. *See, e.g.*, *Campbell*, 282 F. Supp. 2d at 1332. Under the FCA, there must be an objective falsehood and there is a scienter requirement. False statements cases also have a materiality requirement.

A. A knowingly false TINA certification could provide the basis for an FCA claim

A TINA violation could serve as the basis of an FCA claim if a contractor knowingly submits a false TINA certification (one certifying cost or pricing data that is known to be defective) and the certification is material to a claim for payment such as in the negotiated

contract. *See United States ex rel. Sanders v. Allison Engine Co.*, 471 F.3d 610, 623 (6th Cir. 2006) (citing *United States ex rel. Compton v. Midwest Specialties, Inc.*, 142 F.3d 296, 304 (6th Cir. 1998)) (noting an omission of pertinent cost and pricing data would violate TINA and a cause of action would exist under the FCA because the contractors "submitted claims for payment despite knowledge of their non-compliance with all contractual provisions and applicable statutes"), *rev'd on other grounds*, 553 U.S. 662 (2008); *United States ex rel. Watkins v. KBR, Inc.*, 106 F. Supp. 3d 946, 955 (C.D. Ill. 2015) (stating the FCA allegation must "connect the alleged violation of TINA . . . to the allegedly false statement made by Defendants to get a submitted claim paid").

However, it must be shown that in making the TINA certification, the contractor "made a statement in order to receive money from the government." *Watkins*, 106 F. Supp. 3d at 956. In other words, FCA liability based on a regulatory violation requires a contractor to falsely certify its regulatory compliance "*in making its claim for payment*" and therefore false general certifications may not be material to the government's decision to pay the claims. *Id.* (emphasis in original) (citing *United States ex rel. Yannacopoulos v. General Dynamics*, 652 F.3d 818 (7th Cir. 2011)). Thus, where a contractor does not provide false certifications with invoices or vouchers submitted to the government, there may be no statement made to receive money from the government; general TINA certifications at the time of contract formation may be "too remotely connected to the obtainment of payment under the [contract] to incur liability under the FCA." *Id.* at 957.

1. The government must first show a TINA violation occurred

For a TINA violation to serve as the basis for an FCA claim, it must first be shown that there was a TINA violation. The allegedly false statement must involve (1) cost or pricing data that (2) is not disclosed or is not meaningfully disclosed and (3) influences the government's decision. *Watkins*, 106 F. Supp. 3d at 958–60 (analyzing whether a bid analysis constituted cost and pricing data and whether disclosure would have influenced the government's decision to finalize the contract at issue); *cf. United States ex rel. Rille v. Sun Microsystems, Inc.*, No. 4:04-CV-00986-BRW, 2012 WL 260755, at *3 (E.D. Ark. Jan. 30, 2012) (citing *United States v. JT Const. Co.*, 668 F. Supp. 592, 593 (W.D. Tex. 1987)) (requiring "that the contractor acted with the requisite intent" in place of influencing the government's decision).

Where there is no violation of TINA, that statute cannot serve as the basis of an FCA claim. In *Sanders*, the court found the subcontractor defendants did not violate TINA because they had only preliminary plans to negotiate a lower price for the equipment at issue at the time they reached an agreement on price with the prime contractor. *Sanders*, 471 F.3d at 625. Additionally, the defendants had no duty to disclose the agreement that did lower the price because it came thirteen months after the agreement with the prime contractor. *Id.* Without a TINA violation, there was no cause of action under the FCA and summary judgment was appropriate on that issue. *Id.* at 626.

2. The government must satisfy the FCA's scienter requirement

To succeed on an FCA claim, the government must show that the contractor acted with the requisite knowledge in falsely certifying its adherence to TINA and its regulations. *See Sikorsky*, 51 F. Supp. 2d at 197–99 (contractor admitted to TINA violation but court found government had not shown requisite scienter for an FCA claim). The government must prove by a preponderance of the evidence that the contractor knowingly presented a false claim to the government or that it knowingly made a false statement to get a claim it knew was false paid or approved. *Id.* at 196. As defined in the text of the statute, actual knowledge as well as reckless disregard of the falsity of information are sufficient to meet the FCA's scienter requirement. 31 U.S.C. § 3729(b)(1)(A); *see also United States ex rel. Owens v. First Kuwaiti Gen. Trading & Contracting Co.*, 612 F.3d 724, 728 (4th Cir. 2010) (noting "honest mistakes or incorrect claims submitted through mere negligence" are insufficient to satisfy scienter).

The *Safeco* standard adopted by several circuits also establishes an objectively reasonable threshold for legally false claims. *See, e.g.*, *Schutte*, 9 F.4th at 468. Thus, for a TINA claim to also satisfy the FCA's scienter requirement, the government would need to show that the contractor acted with at least reckless disregard toward the false claims or statements it made. In circuits that have adopted the *Safeco* standard, the government would need to show that the contractor lacked an objectively reasonable interpretation of TINA or an applicable Federal Acquisition Regulation, or that there was guidance that would have warned the contractor away from its reasonable interpretation. *Id.*

Showing a contractor had knowledge that its claims were false are crucial to an FCA claim, as "it is the defendant's knowledge of the falsity of its claim that is the statutory basis for a claim under the False Claims Act." *Sikorsky*, 51 F. Supp. 2d at 196. In *Sikorsky*, a contractor admitted to violating TINA with respect to certain goods; nevertheless, it argued that neither its TINA certificate nor any of its claims were knowingly false or fraudulent. *Id.* The government argued that the court's analysis on the scienter issue should be based on the contractor's corporate knowledge so that it only needed to show that one employee had actual knowledge of the contractor's conduct and its duty to report accurate data to the government. *Id.* The court rejected the collective corporate knowledge doctrine and found that the government failed to show that certain employees had any knowledge that representations made in the certificate were false or acted in reckless disregard as to the truth or falsity of the certificate. *Id.* at 199. In *Campbell*, the court established that the defendant should have disclosed labor data that constituted cost or pricing data under TINA; the court denied the defendant's motion for summary judgment on the government's FCA claims in part because the defendant presented claims for payment despite knowing they did not reflect accurate labor data. *Campbell*, 282 F. Supp. 2d at 1342.

The government's burden in showing the contractor had knowledge its claims or statements were false is lower at the motion to dismiss stage, where knowledge must only be adequately plead. One court denied a contractor's motion to dismiss where the government adequately alleged it failed to disclose pertinent cost and pricing data when it was requested during negotiations. *United States ex rel. Woodlee v. Sci. Applications Int'l Corp.*, No. SA-02-CA-028-WWJ, 2005 WL 729684, at *4 (W.D. Tex. Feb. 4, 2005). The government adequately

alleged the contractor perpetrated a "scheme to fraudulently inflate its profits" by knowingly concealing data from government contract negotiators. *Id.* at *2. In another case, the government adequately alleged the contractor acted knowingly by preparing an updated bill of materials but did not disclose the costs therein to the government because it was afraid the costs would result in a lower-priced contract. *United States v. BAE Sys. Tactical Vehicle Sys., LP*, No. 15-12225, 2016 WL 894567, at *3 (E.D. Mich. Mar. 9, 2016). The government further adequately alleged that the contractor's failure to disclose those costs meant that the contractor provided a TINA certification while knowing its cost or pricing data was defective. *Id.*

Applicant Details

First Name	**Eric**
Last Name	**Selzer**
Citizenship Status	**U. S. Citizen**
Email Address	**eric.selzer@law.northwestern.edu**
Address	**Address** Street **200 E CHESTNUT ST, APT 601** City **Chicago** State/Territory **Illinois** Zip **60611-2311** Country **United States**
Contact Phone Number	**8608171655**

Applicant Education

BA/BS From	**University of Pennsylvania**
Date of BA/BS	**May 2019**
JD/LLB From	**Northwestern University School of Law** **http://www.law.northwestern.edu/**
Date of JD/LLB	**May 1, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Northwestern University Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Tuerkheimer, Deborah
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(312) 503-4864
Ruff, Robert
robert.ruff@usdoj.gov
203-623-2033
Kang, Michael
mkang@northwestern.edu
(312) 503-7344

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Eric Selzer
200 East Chestnut Street, Apartment 601
Chicago, IL 60611
eric.selzer@law.northwestern.edu, 860-817-1655

June 5, 2023

The Honorable Juan R. Sanchez
United States District Court, Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market Street, Room 8613
Philadelphia, PA 19106

Dear Chief Judge Sanchez:

Enclosed please find my application for a clerkship in your chambers for the 2024-25 term. I am a rising third-year student at Northwestern Pritzker School of Law in Chicago and will graduate in May 2024. A clerkship in your chambers would be an invaluable opportunity to expand upon my prior litigation experiences and broaden my understanding of the district court process. As a graduate of the University of Pennsylvania, I would welcome the opportunity to return to Philadelphia next year.

My experiences at Northwestern in my first two years of law school have prepared me to make a meaningful contribution to your chambers. As a judicial extern for Judge Virginia Kendall of the U.S. District Court for the Northern District of Illinois this past spring, I gained valuable research and writing experience while drafting opinions in a variety of subject areas on tight deadlines. I would also bring helpful editing experience to your chambers' writing process. In my position as Senior Managing Editor of the *Northwestern University Law Review*, I supervise eight student staff members and oversee assertion-checking, sourcing, and Bluebooking for the journal. This role requires a particularly keen eye for detail, which I anticipate will be useful in my role as a clerk.

My application includes my resume, law school transcript, and writing sample, which is a section from my student note for the *Northwestern University Law Review* on leadership political action committees and the bribery risks associated with these committees' loosely regulated spending. You will also find letters of recommendation from the following individuals:

> Professor Michael Kang, Northwestern Pritzker School of Law
> mkang@northwestern.edu; 312-503-7344
>
> Robert Ruff, Assistant U.S. Attorney, District of Connecticut
> RRuff@usa.doj.gov; 203-623-2033
>
> Professor Deborah Tuerkheimer, Northwestern Pritzker School of Law
> deborah.tuerkheimer@law.northwestern.edu; 312-503-4864

I would welcome the opportunity to interview with you for this position. Thank you in advance for your consideration.

Respectfully,

Eric Selzer

ERIC SELZER
200 E. Chestnut St., Apt. 601, Chicago, IL 60611 • eric.selzer@law.northwestern.edu • (860) 817-1655

EDUCATION

Northwestern Pritzker School of Law, Chicago, IL
Candidate for J.D., May 2024 GPA: 3.947

- *Northwestern University Law Review*, Senior Managing Editor
- Teaching Assistant, Criminal Law (Professor Deborah Tuerkheimer, Spring 2023)
- Research Assistant to Professor Michael Kang (research topics include state supreme court elections and privacy law relating to Census data)
- Election Law Association, President and Chairperson of Northwestern's Day of Civic Service
- Jewish Law Students Association, Vice President

University of Pennsylvania, Philadelphia, PA
B.A. with Distinction in Political Science, Minors in Music and European Studies, summa cum laude, May 2019

- Phi Beta Kappa; Pi Sigma Alpha National Political Science Honor Society; Delta Phi Alpha German National Honor Society; German Society of Pennsylvania Prize
- Senior Honors Thesis in Political Science: *An Evaluation of the Effects of Voter Identification Laws on Turnout Among College Students: Evidence from Wisconsin and Minnesota*
- Research Assistant to Professor Yphtach Lelkes (studying voter ID laws and affective polarization)
- Penn Club Tennis (President); Penn Baroque Ensemble (Principal Viola); Penn Symphony Orchestra; West Philadelphia Tutoring Project
- University of Edinburgh, Political Parliamentary Program (Fall 2017 Semester Abroad)
    - Coursework in British politics and government; Legislative Intern for Alexander Burnett, Member of Scottish Parliament; Edinburgh University Lawn Tennis Team

EXPERIENCE

Wachtell, Lipton, Rosen & Katz, New York, NY
Summer Associate, May 2023 - Present

- Rotating through the Litigation, Corporate, and Executive Compensation & Benefits practice groups

Hon. Virginia M. Kendall, U.S. District Court, Northern District of Illinois, Chicago, IL
Judicial Extern, January 2023 - April 2023

- Drafted opinions deciding motions to dismiss in complex contract dispute and employment discrimination cases
- Conducted legal and historical research for opinion on challenge to Illinois' assault weapons ban

United States Attorney's Office for the District of Connecticut, Hartford, CT
Law Student Intern, May 2022 - August 2022

- Researched and prepared memoranda on topics including Federal Tort Claims Act liability, compassionate release, and the availability of the duress defense in narcotics trafficking cases
- Drafted charging recommendations and sentencing memoranda for drug trafficking and bank robbery cases
- Attended and assisted attorneys in preparation for witness interviews, depositions, and a criminal trial

Kobre & Kim LLP, New York, NY
Legal Analyst, June 2019 - July 2021

- Performed legal research and conducted factual investigation for securities, futures market spoofing, and cross-border asset tracing cases
- Managed team of six analysts and paralegals on a securities fraud case involving DOJ, SEC, and state regulatory investigations and securities class action lawsuits
- Assisted in preparing guidance to local governments on permissible uses of CARES Act funding as part of Bloomberg Philanthropies' COVID-19 Local Response Initiative

ADDITIONAL INFORMATION

Language Skills: German (elementary proficiency)
Volunteer Activities: Illinois Legal Aid Live Help Volunteer
Activities & Interests: Chicago Bar Association Symphony (Asst. Principal Viola), Tennis, Cycling, Jeopardy!

Northwestern
PRITZKER SCHOOL OF LAW

UNOFFICIAL GRADE SHEET

THIS IS NOT AN OFFICIAL TRANSCRIPT

The Northwestern University School of Law permits the use of this grade sheet for unofficial purposes only.
To verify grades and degree, students must request an official transcript produced by the Law School.

Name:	**Eric Selzer**	Total Earned Credit Hours:	57.000
Matriculation Date:	2021-08-30	Total Transfer Credit Hours:	0.000
Program(s):	Juris Doctor	Cumulative Credit Hours:	57.000
		Cumulative GPA:	3.947

Term	Term GPA	Course	Course Title	Credits	Grade	Professor
2021 Fall	3.859	BUSCOM 510	Contracts	3.000	A	Schanzenbach,Max M
		LAWSTUDY 540	Communication& Legal Reasoning	2.000	A	McMasters,Jim
		LITARB 530	Civil Procedure	3.000	A	Pfander,James E
		PPTYTORT 530	Property	3.000	A-	Rodriguez,Daniel B
		PPTYTORT 550	Torts	3.000	A-	Mulaney,Ellen S
2022 Spring	4.000	BUSCOM 601S	Business Associations	3.000	A	Kang,Michael S.
		CONPUB 500	Constitutional Law	3.000	A	Redish,Martin H
		CONPUB 644	Legislation	3.000	A-	Mulaney,Ellen S
		CRIM 520	Criminal Law	3.000	A+	Tuerkheimer,Deborah
		LAWSTUDY 541	Communication& Legal Reasoning	2.000	A	McMasters,Jim
2022 Fall	3.932	BUSCOM 638	Mergers and Acquisitions	3.000	A+	O'Hare,John M
		CONPUB 661	Election Law	3.000	A-	Kang,Michael S.
		CRIM 610	Constitutional Crim Procedure	3.000	B+	Allen,Ronald J
		LAWSTUDY 500	Independent Study	3.000	A+	Kang,Michael S.
		LITARB 635	Evidence	3.000	A	Tuerkheimer,Deborah
2023 Spring	4.000	BUSCOM 844	M&A and Shareholder Litigation	2.000	A-	Ducayet,James Wallace
		CONPUB 647	Practicum: Judicial	4.000	A	Wilson,Cynthia A
		LITARB 600G	Leg. Ethics in Global Leg Prac	2.000	A+	Muchman,Wendy
		LITARB 650	Civil Procedure II	3.000	A	Redish,Martin H
		LITARB 656	Remedies	3.000	A	Lupo,James

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NORTHWESTERN PRITZKER SCHOOL OF LAW

June 10, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

It is my privilege to recommend Eric Selzer for a clerkship with your chambers. Eric is an extraordinary student. He is possessed of sharp analytic abilities, keen insight, and an abundance of intellectual curiosity. Plus, he is a remarkably hard worker. I have watched Eric excel in many settings: as a student in two large doctrinal courses and, more recently, as my fabulous Criminal Law Teaching Assistant. I am therefore quite confident in my assessment of his talents and skills, which make him extremely well suited to the work of a judicial clerk. For reasons detailed below, it is my great pleasure to recommend him to you, and I do so without qualification.

I first met Eric in my Criminal Law course. At the time, he was just beginning his law school career and, like others in the class, he was entirely new to the enterprise—although his work experience had already sparked a real passion for criminal justice, which was apparent from the outset. Eric quickly impressed me with his willingness to engage deeply and actively with the material. Whether discussing theories of punishment, the elements of crime, or standards of appellate review, Eric's participation invariably reflected thorough preparation and an uncommon ability to apply sound judgment to challenging doctrinal puzzles. Eric could always be counted on to provide thoughtful, informed contributions to class discussion, and I never hesitated to call on him "cold" when the discussion called for a boost.

As the semester progressed, Eric continued to distinguish himself admirably among his sixty-plus classmates. In particular, I was struck by his consistent grasp of complex doctrinal concepts, as well as his smart application of the law to changing fact patterns. It was clear that Eric energetically approached the task of learning how criminal justice operates on the ground. His command of the material and a remarkable capacity to synthesize it on conspicuous display in his final exam, which, graded blindly, was at the top of the class.

I was thrilled to hire Eric as my Teaching Assistant (one of two) for Criminal Law this past semester. Eric's job was a demanding one. He held weekly office hours with members of our sixty-person section, several of whom were overwhelmed by the material and with law school in general. Many students looked to Eric to help guide them through the thicket. Eric also provided detailed feedback on students' mid-term exams and led an extensive review session before the final exam. In the face of these responsibilities, which were added to an already packed schedule of classes and activities, Eric was undaunted. He was methodical, disciplined, sensitive to the needs of others, and incredibly organized in his approach to the job—in short, a perfect Teaching Assistant. I consider myself and our students fortunate indeed.

I should add that, after I hired Eric to be my Criminal Law TA, he enrolled as a student in my Evidence class this past fall. Again, he stood out as among the most impressive of his seventy classmates, providing particularly adept at applying the rules of evidence to changing fact patterns and at thinking abstractly about the relationship between the rules and the search for truth. And again, Eric's diligence and drive to master difficult material were reflected in a stellar final exam.

Finally, Eric is, quite simply, a joy to know. He obviously commands the respect and affection of his classmates, who seem to appreciate (as do I!) the genuine humility and quiet demeanor that co-exist with his many talents and a remarkable wit. Eric's commitment to excellence in his every pursuit is striking, and of course it bodes wonderfully for success in future endeavors. From our past conversations, I know that Eric is highly motivated to contribute meaningfully to the work of chambers, to tackle every challenge, and to appreciably grow as a professional. I have no doubt whatsoever that he will accomplish exactly what he intends.

Please let me know if I can provide any additional information helpful to your decision. I am always thrilled to sing Eric's praises. He is a special person, and he will make a standout clerk.

Respectfully,

Deborah Tuerkheimer
Class of 1967 James B. Haddad Professor
Northwestern Pritzker School of Law

Deborah Tuerkheimer - Deborah.Tuerkheimer@law.northwestern.edu - (312) 503-4864

United States Department of Justice

United States Attorney
District of Connecticut

Connecticut Financial Center
157 Church Street, 25th Floor
New Haven, Connecticut 06510

(203) 821-3700
Fax (203) 773-5376
www.justice.gov/usao-ct

June 6, 2023

The Honorable «First_Name» «Middle_Name» «Last_Name»
«Court»
«AddressBlock»

Dear «Salutation» «Last_Name»:

I write to express my strong support for Eric Selzer's clerkship application. As background, I am an Assistant U.S. Attorney in the District of Connecticut, assigned to the Criminal Division (Violent Crimes and Narcotics Unit) and to the Appellate Division. I also manage with another AUSA the office's internship program in Hartford. Before joining the U.S. Attorney's Office in 2020, I practiced at Weil, Gotshal & Manges in New York (2012-2016 and 2017-2020), and I also clerked in the Southern District of New York (2016-2017) and in the Delaware Court of Chancery (2011-2012). I got to know Eric through his summer 2022 internship at the U.S. Attorney's Office in Hartford.

What stood out to me most about Eric was his writing ability. Eric drafted a sentencing memorandum and a brief for two of my cases. His writing was polished, clear, and well-organized. Both documents could have been filed as drafted. I understand that Eric also helped the other interns with drafting, which shows he is a team player. I know a big question when hiring a law clerk is whether the person is ready for the writing-intensive nature of a judicial clerkship. Eric will jump right in and be an asset to Your Honor's chambers.

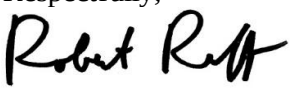
During his internship with the U.S. Attorney's Office, Eric also took advantage of the opportunity to observe court as often as possible. This is something we encourage our interns to do, as it can demystify court and show interns different styles of advocacy and what works and does not work. Eric was able to observe at least one criminal trial and numerous other proceedings. He was a fixture in the courtroom gallery, even when I neglected to give our interns a heads up about a proceeding, which means he stayed on top of the court's calendar to gain exposure to our justice system.

Eric also has the right attitude and demeanor for a clerkship. He is eager to work, and a pleasure to work with. Our Hartford office has a small-firm feel with a relatively small number

of AUSAs. We take our work seriously, but not ourselves. Eric fit right in at the office, and I have no doubt he would be a welcome addition to Your Honor's chambers.

Please do not hesitate to contact me with any questions at 203-623-2033 (direct line) or robert.ruff@usdoj.gov.

Respectfully,



ROBERT S. RUFF
ASSISTANT U.S. ATTORNEY

NORTHWESTERN PRITZKER SCHOOL OF LAW

June 10, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write enthusiastically to recommend Eric Selzer for a clerkship with you. Eric is the best research assistant I've had at Northwestern and one of our very best students at our law school. He took my Business Associations and Election Law classes, and I supervised his law review comment last year. He is a fantastic person, super sharp and gifted, and will be an exceptional clerk whom I couldn't recommend more highly.

Eric was an amazing research assistant for me last year. He worked on my book with Joanna Shepherd about state supreme court elections and on a separate project about the redistricting implications of the Census Bureau's adoption of differential privacy for the last Census. Eric really shined in particular on the latter project, which I wouldn't have trusted with most of my past research assistants. Neither Eric nor I had any background in privacy law or the Census, but Eric adeptly learned the law of the Census and the relevant privacy law to determine and consolidate what I needed to know for my project. I was incredibly impressed by his initiative in figuring things out on his own and making the right choices without much direction from me. For my book, Eric did everything from researching and assessing various state supreme court reform proposals, to figuring out campaign finance law specific to judicial elections, to technical editing in a pinch. Eric is one of those people whom you can trust to ace basically any project you give him and to do so efficiently without much supervision. He is super smart and hardworking, but just as important, he has outstanding professional judgment.

Eric also excelled as a student in my classes. He is quiet and doesn't say too much in class unless he has an important question to ask. However, I use Socratic Method in class and would save Eric for a particularly thorny set of issues that I knew he, but not every student, could navigate. I was extremely impressed by how well Eric absorbed campaign finance law from my Election Law class, as I learned when I oversaw his law review comment. Campaign finance law is the most difficult subject I teach. Students typically struggle most with campaign finance questions on the exam and, I suspect, they don't always walk away from the class with a deep understanding of the complex law. However, Eric dove into a campaign finance topic for his comment, the personal use restriction as it applies to leadership PACs, and demonstrated an impressive grasp of campaign finance law in a specific area that we actually didn't cover at all in class. Eric wrote a superb comment, very well researched, persuasive, and timely. I helped him more with structure and form of argument than with the actual substance, which he sorted out entirely himself.

Eric, as I mentioned, is a quiet guy but as a result, someone you like so much as you slowly learn more about him. He is as unpretentious and collegial as anyone you'll ever meet, someone who is always available to help and gets along with everyone. His easy-going demeanor disguises a tremendous work ethic and energy to keep busy. I'm embarrassed by how often I called on him during the school year for emergency help with projects, but Eric always made time to help me out, even when he had quite a bit going on. He does a huge amount at Northwestern, from the Election Law Association, to working as a teaching assistant, to externing for a judge, lots of volunteer work, and playing viola in the Chicago Bar Association Symphony. I actually had no idea that he was such an accomplished musician and tennis player until I knew him for a while.

I couldn't be more confident that Eric will be one of the best clerks you ever hire. He is one of my favorite students and definitely one whose bright future I'm really excited to watch. Please contact me with any questions at mkang@northwestern.edu or 312-503-7344. Thank you.

Respectfully,

Michael S. Kang
Class of 1940 Research Professor of Law
Northwestern Pritzker School of Law

Michael Kang - mkang@northwestern.edu - (312) 503-7344

Eric Selzer
200 East Chestnut Street, Apartment 601, Chicago, IL 60611
eric.selzer@law.northwestern.edu; 860-817-1655

WRITING SAMPLE

This writing sample is an unedited excerpt from a draft of an independent study paper that I wrote for submission to the *Northwestern University Law Review*. In the paper, "Personal Use as Political Bribery: Closing the Leadership PAC Loophole," I examine the campaign finance regulatory framework in which leadership political action committees (leadership PACs) operate. Leadership PACs first emerged in the late 1970s as a new type of fundraising committee that incumbents and candidates for federal office could form to provide additional support to their colleagues in Congress. As of 2019, ninety-two percent of members of Congress had established leadership PACs, through which they raise money to contribute to the campaigns of other members of Congress and promote party-building.

Campaign finance law explicitly prohibits the use of campaign funds for personal use. But due to the unusual legal development of leadership PACs outside the purview of campaign finance regulations, the personal use restriction does not definitively apply to these committees, which operate in a legal gray area. Members of Congress continue to use leadership PAC funds for ostentatious spending that would arguably violate the personal use restriction, with critics referring to them as personal "slush funds" for politicians. With Congress and the Federal Election Commission reluctant to close this loophole, my paper looks to bribery law to demonstrate even more clearly the corruption risks associated with unregulated leadership PAC spending.

I have modified the original structure of the paper for this excerpt. Part I, which is omitted here, traces the evolution of the personal use restriction in parallel with the rise of leadership PACs, assessing how they came to operate outside the scope of that restriction. Given the current legal framework in which neither Congress nor the FEC seems prepared to extend the scope of the personal use restriction, Part II, excerpted here, examines leadership PACs in the context of bribery law to demonstrate the corruption risks associated with candidates' use of these loosely regulated fundraising vehicles. Finally, Part III, which is also omitted, addresses how the bribery risks associated with leadership PACs would change if the personal use restriction were to be applied to them. The use of candidate-to-candidate leadership PAC contributions for the trading of political favors would continue to raise concerns about how public officials achieve their legislative goals, but it is unlikely that courts will view such uses as running afoul of bribery law. I have renumbered footnotes in this excerpt. The full paper is available upon request.

PART II: The Bribery and Gratuity Risks Associated with Leadership PACs

This section begins with an overview of the relevant federal bribery statutes and the caselaw interpreting them in the context of campaign contributions to public officials. Analyzing leadership PAC spending for personal use purposes within this framework reveals that the fundamental risk of not applying the personal use restriction to leadership PACs is that candidates and donors can potentially circumvent the bribery and gratuity statutes and thus achieve the functional equivalent of a bribe without violating bribery law.

A. The Political Bribery Framework

Congress has enacted several anti-corruption statutes targeting public corruption,[1] which the Supreme Court has collectively characterized as "an intricate web of regulations, both administrative and criminal, governing the acceptance of gifts and other self-enriching actions by public officials."[2] Other observers have described a "hodgepodge"[3] of federal anti-corruption laws. As synthesized by Professor Daniel Lowenstein, the crime of bribery in this context generally consists of five distinct elements: (1) the involvement of a public official, (2) the defendant's having a corrupt intent, and (3) the official's receiving something of value which (4) relates to an official act and (5) involves intent to influence the public official (or from the perspective of the public official, to be influenced) in the performance of the official act.[4] The statute criminalizing bribery of public officials and witnesses, 18 U.S.C. § 201, is representative.[5]

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[1] *See* Jacob Eisler, *McDonnell and Anti-Corruption's Last Stand*, 50 U.C. DAVIS L. REV. 1619, 1627–28 n.23 (2017) (listing key anti-corruption statutes, including those criminalizing bribery and illegal gratuities, federal funds bribery, extortion in interstate commerce, and honest services fraud).
[2] United States v. Sun-Diamond Growers of California, 526 U.S. 398, 399 (1999).
[3] Peter J. Henning, *Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law*, 18 ARIZ. J. INT'L & COMP. L. 793, 798 (2001).
[4] Daniel Hays Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 795–96 (1985).
[5] Under this section:

> (b) Whoever—
> (1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official . . . or offers or promises any public official . . . to give anything of value to any other person or entity, with intent—
> (A) to influence any official act; . . .
> (2) being a public official . . . directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:
> (A) being influenced in the performance of any official act; . . .
> shall be fined . . . or imprisoned . . . or both.

While bribery involves a public official's accepting something of value in exchange for being influenced to perform an official act, Section 201 also covers illegal gratuities, a lesser offense which prohibits public officials from personally accepting anything of value given for or because of an official act.[6] To prove an illegal gratuity, the government must demonstrate that "anything of value" was provided to a current, former, or recently selected public official "for or because of any official act performed or to be performed by such public official."[7] The requirement of an exchange of "anything of value" for an official act is the same for bribery and illegal gratuities, and both apply to the donor and public official. Unlike bribery, illegal gratuities also apply to former public officials and are limited to the public official's receipt of "anything of value personally."[8] A bribe may be solicited personally or "for any other person or entity,"[9] bringing contributions to campaign committees under the ambit of Section 201(b).

The crucial distinction between a bribe and an illegal gratuity is the intent element, a distinction which the Supreme Court expounded in its 1999 decision *United States v. Sun-Diamond Growers of California*.[10] The defendant, an agricultural trade association, was convicted under Section 201(c) for providing $5,900 in gratuities, in the form of U.S. Open tennis tickets, luggage, meals, and a framed print and crystal bowl, to Secretary of Agriculture Michael Espy while two matters relating to a federal grant program and the regulation of a certain pesticide, both of which the association had an interest in, were

18 U.S.C. § 201(b).

[6] 18 U.S.C. § 201(c). Under this section:

> (c) Whoever—
> (1) otherwise than as provided by law for the proper discharge of official duty--
> (A) directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; or
> (B) being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of any official act performed or to be performed by such official or person;
> . . .
> shall be fined under this title or imprisoned for not more than two years, or both.

[7] *Id.* The term "illegal gratuity" does not appear in the statute but is commonly used to refer to offenses under Section 201(c).
[8] 18 U.S.C. § 201(c).
[9] 18 U.S.C. § 201(b)(2).
[10] 526 U.S. 398 (1999).

pending before the Department of Agriculture.[11] The Court unanimously rejected the government's argument that the prospect of influence alone could sustain an illegal gratuity conviction, holding that "the Government must prove a link between a thing of value conferred upon a federal official and a specific 'official act' for or because of which it was given."[12] The absence of an official act and the Court's hesitance to criminalize the innocent giving of "token gifts" separate from any official action[13] were central to the decision, but the Court also focused on the difference between illegal gratuity and bribery, noting that "for bribery there must be a *quid pro quo*—a specific intent to give or receive something of value *in exchange* for an official act,"[14] while illegal gratuity crucially does not require a specific intent.[15] Thus, the government must establish proof of a *quid pro quo* to prove a bribery violation under Section 201(b).[16]

In summary, illegal gratuities are often thought of as "merely a reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken,"[17] while the "corrupt" element of the bribery statute "bespeaks a higher degree of criminal knowledge and purpose."[18] Courts have been careful to distinguish between legitimate campaign contributions meant to demonstrate support and bribes. An early interpretation of Section 201 emphasized that "[n]ot every gift, favor or contribution to a government or political official constitutes bribery, and it is universally recognized that bribery occurs only if the gift is coupled with a particular criminal intent."[19]

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[11] *Id.* at 400–01, 404–05.
[12] *Id.* at 414.
[13] *Id.* at 406.
[14] *Id.* at 404–05.
[15] *See id.* ("The distinguishing feature of each crime is its intent element. Bribery requires intent 'to influence' an official act or 'to be influenced' in an official act, while illegal gratuity requires only that the gratuity be given or accepted 'for or because of' an official act . . . An illegal gratuity. . . may constitute merely a reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken.").
[16] The Court has also required showing of a quid pro quo in prosecutions for extortion under the Hobbs Act, a statute which prohibits interference with commerce using extortion. 18 U.S.C. § 1951. Prosecutions for taking campaign contributions as bribes are often brought under the Hobbs Act, which defines extortion as "obtaining of property from another with his consent, induced . . . under color of official right." Courts have noted the close relationship between the Hobbs Act and the bribery statute, referring to them as "really different sides of the same coin." *United States v. Allen*, 10 F.3d 405, 411 (7th Cir. 1993). In McCormick v. United States, the Supreme Court reversed the Hobbs Act conviction of a member of the West Virginia House of Delegates who sponsored a bill to grant medical licenses to foreign doctors in return for campaign donations from an organization of those doctors, holding that a quid pro quo is necessary for conviction under the Hobbs Act when an official receives a campaign contribution. 500 U.S. 257, 259–61, 274 (1991).
[17] United States v. Sun-Diamond Growers of California, 526 U.S. 398, 405 (1999).
[18] United States v. Brewster, 506 F.2d 62, 71 (D.C. Cir. 1974).
[19] United States v. Harvey, 532 F.3d 326, 335 (4th Cir. 2008).

Instead, the bribe must be the "prime mover or producer of the official act"[20] and "[v]ague expectations of some future benefit should not be sufficient to make a payment a bribe."[21] Although the Court in *Sun-Diamond* identified the existence of a *quid pro quo* as the distinguishing feature between bribery and illegal gratuities, it did not clearly elucidate the relationship between the required *quid pro quo* and the reference to "corruptly" in Section 201(b). Federal appellate courts have vacillated on exactly what role the corrupt intent element plays in the bribery statute. While some have interpreted corrupt intent to require a moral judgment made by the jury about the public official's actions, others have conflated this element with the *quid pro quo* requirement.[22] Despite these inconsistencies, bribery law is regularly employed to police campaign contributions.

B. Campaign Contributions as Bribes

It is well-established that campaign contributions can be bribes. The earliest cases dealing with corrupt contributions in the 1920s and 1930s treated campaign contributions in line with other means of facilitating bribes.[23] In recent years, bribery charges stemming from campaign contributions have involved donations ranging from hundreds to hundreds of thousands of dollars. In 2011, the Eleventh Circuit upheld the conviction of Don Siegelman, the former governor of Alabama, for federal funds bribery[24] for arranging a hospital executive's $500,000 contribution to Siegelman's campaign for a state lottery initiative in exchange for an appointment to a state healthcare review board.[25] On the lower end of the spectrum, the Sixth Circuit affirmed the honest services fraud bribery conviction of a state court judge who accepted $500 in campaign contributions and $700 worth of office supplies for the campaign in exchange for agreeing to deny two summary judgment motions filed by a bank.[26] Yet bribery using campaign contributions remains

[20] United States v. Brewster, 506 F.2d 62, 82 (D.C. Cir. 1974).
[21] United States v. Allen, 10 F.3d 405, 411 (7th Cir. 1993).
[22] *See* Brandon Hughes, *The Crucial 'Corrupt Intent' Element in Federal Bribery Laws*, 51 CALIFORNIA WESTERN L. REV 25, 35–43 (tracing conflicting federal appellate court constructions of the intent element in the bribery statute).
[23] ZEPHYR TEACHOUT, CORRUPTION IN AMERICA 218–19 (2014).
[24] Another statute under which bribery charges are commonly brought is the federal program bribery statute, which criminalizes bribery involving an agent of an organization, state, or local government that receives $10,000 or more annually in federal funding. 18 U.S.C. § 666.
[25] United States v. Siegelman, 640 F.3d 1159, 1165–66 (11th Cir. 2011).
[26] United States v. Terry, 707 F.3d 607, 610, 615 (6th Cir. 2013).

difficult to prove, due in part to the heightened intent requirement and the fine line separating questionable and truly corrupt contributions, as well as the Supreme Court's recent narrowing of the scope of official acts.[27] In the high-profile 2015 prosecution of New Jersey Senator Bob Menendez, prosecutors alleged that a Florida doctor's $300,000 donation to a super PAC supporting the senator in exchange for his intervention on behalf of the donor in a Medicare billing dispute with the Department of Health and Human Services constituted a bribe under Section 201. Despite extensive evidence of a scheme to trade political favors for vacations, golf trips, campaign contributions, and expensive flights, the trial judge dismissed multiple charges relating to doctor's campaign contributions, noting that prosecutors had failed to "prove an explicit quid pro quo" and "a rational juror could not find an explicit quid pro quo on the political contribution counts."[28] The Department of Justice ultimately dropped the remaining charges against Menendez after a mistrial in 2018.[29] With this political bribery framework established, the next section analyzes the bribery risks surrounding unregulated leadership PAC contributions.

C. Leadership PAC Bribery Risks

The fundamental risk of not applying the personal use restriction to leadership PACs is that candidates and donors can insulate themselves from the requirements of the bribery statute and thus more easily achieve the functional equivalent of a bribe while evading criminal liability. As Judge John Noonan observed, "[t]he core of the concept of a bribe is an inducement improperly influencing the performance of a public function meant to be gratuitously exercised."[30] That inducement, the "thing of value" in the bribery and illegal gratuity statutes, has been "defined broadly to include 'the value which the defendant

[27] *See infra* Part II.C.
[28] Nick Corasaniti, Judge Acquits Senator Menendez of Several Charges, N.Y TIMES (Jan. 24, 2018), https://www.nytimes.com/2018/01/24/nyregion/menendez-new-jersey-senator-corruption.html.
[29] Matt Friedman & Ryan Hutchins, *Justice Department drops corruption case against Menendez*, POLITICO (Jan. 31, 2018) https://www.politico.com/story/2018/01/31/dismissal-of-menendez-case-380230.
[30] BRIBES, JOHN T. NOONAN JR. xi (1984).

subjectively attaches to the items received'"[31] and can involve both tangible and intangible benefits,[32] but in the classic bribe the public official receives a purely private benefit from a private donor in the form of money or tangible items.

Commentators take different approaches to articulating theories of political bribery, but most agree that an official's receiving a private personal benefit is at the core of the offense. Professor Deborah Hellman conceives of bribery as involving "a boundary crossing, the exchange of value from one domain or sphere of value into another."[33] The exchange of money or goods of non-political value for an official act constitutes bribery because the benefit received is "external to the political sphere."[34] Meanwhile, Professor Daniel Lowenstein notes that the corrupt intent element of bribery expresses society's judgment that "[t]hose who, having voluntarily assumed public office, set aside the public trust for private advantage (and those who tempt public officials to do so) engage in morally reprehensible conduct by striking at the roots of fairness and democracy."[35] Professor Zephyr Teachout characterizes the classic American approach to corruption as "an important concept with unclear boundaries" but one that fundamentally "refers to excessive private interests in the public sphere; an act is corrupt when private interests trump public ones in the exercise of public power, and a person is corrupt when they use public power for their own ends."[36] Similarly, Professor Steven Sachs notes that "[w]hen politicians put private interests before the public good, they act wrongly—even 'corruptly.'"[37]

Thus, it is no surprise that some of the most infamous public corruption scandals in recent history exposed elected officials' brazen use of their offices to obtain purely private benefits. In 2009, Congressman William Jefferson was found guilty of bribery charges and sentenced to thirteen years in prison for soliciting

[31] United States v. Renzi, 769 F.3d 731, 744 (9th Cir. 2014) (quoting United States v. Gorman, 807 F.2d 1299, 1305 (6th Cir. 1986)).
[32] *See, e.g.*, United States v. Townsend, 630 F.3d 1003, 1011 (11th Cir. 2011) (finding that under the federal funds bribery statute, 18 U.S.C. § 666, "intangibles, such as freedom from jail and greater freedom while on pretrial release, are things of value"); United States v. Moore, 525 F.3d 1033, 1048 (11th Cir. 2008) (under Section 201, "monetary worth is not the sole measure of value").
[33] Deborah Hellman, *A Theory of Bribery*, 38 CARDOZO L. REV. 1947, 1971 (2017).
[34] *Id.* at 1972–73.
[35] Daniel Hays Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 806 (1985).
[36] TEACHOUT, *supra* note 104, at 9.
[37] Stephen E. Sachs, *Corruption, Clients, and Political MacHines a Response to Professor Issacharoff*, 124 *Harvard Law Review Forum* 62, 64 (2011).

approximately $400,000 in exchange for promoting corporate interests to U.S. and foreign officials and on official delegations to Africa.[38] An FBI raid of Jefferson's home turned up $90,000 wrapped in aluminum foil in his freezer.[39] Three years earlier, Congressman Randall "Duke" Cunningham was sentenced to more than eight years in prison after pleading guilty to conspiracy to commit bribery, honest services fraud, and tax evasion after he received payments totaling at least $2.4 million in return for assisting defense contractors in obtaining government contracts.[40] Like Jefferson, Cunningham received monetary compensation including cash and $1 million in checks, but he was also rewarded with antiques, yacht club fees, boat repairs, vacation expenses, payments for his daughter's graduation party, and a Rolls Royce, among other items.[41] More recently, Governor Robert McDonnell of Virginia was convicted on bribery charges after he and his wife accepted $175,000 in gifts and loans, including a Rolex watch, tens of thousands of dollars to pay for their daughter's wedding, and $20,000 in designer clothing from the CEO of a company who sought the governor's assistance in facilitating research studies at the state's public universities of a nutritional supplement that the company was developing.[42] Although McDonnell's conviction was overturned by the Supreme Court in a decision that narrowed the definition of official act in the bribery statute, and the Justice Department declined to retry the governor,[43] there is little doubt that the things of value he received would have constituted bribery if tied to official acts.[44]

While Jefferson and Cunningham's cash payments represent the most obvious form of bribery, many of the other benefits bestowed upon them and the McDonnells are not so easily differentiated from

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[38] *See* David Stout, *Ex-Rep. Jefferson Convicted in Bribery Scheme*, N.Y. TIMES (Aug. 5, 2009), https://www.nytimes.com/2009/08/06/us/06jefferson.html, United States Department of Justice, *Former Congressman William J. Jefferson Sentenced to 13 Years in Prison for Bribery and Other Charges* (Nov. 13, 2009), https://www.justice.gov/opa/pr/former-congressman-william-j-jefferson-sentenced-13-years-prison-bribery-and-other-charges.

[39] David Stout, *Ex-Rep. Jefferson Convicted in Bribery Scheme*, N.Y. TIMES (Aug. 5, 2009),

[40] United States Department of Justice, Former Congressman Cunningham Sentenced to More than 8 Years in Prison (March 3, 2006), https://www.justice.gov/archive/tax/usaopress/2006/txdv06cas60303.1.pdf.

[41] *Id.*

[42] McDonnell v. United States, 136 S. Ct. 2355, 2362–64 (2016).

[43] Richard Gonzales, *Feds Drop Corruption Case Against Former Virginia Gov. Bob McDonnell*, NPR (Sep. 8, 2016), https://www.npr.org/sections/thetwo-way/2016/09/08/493167988/feds-drop-corruption-case-against-former-virginia-gov-bob-mcdonnell.

[44] *See* Daniel P. Tokaji, *Bribery and Campaign Finance: McDonnell's Double-Edged Sword*, 14 Ohio St. J. Crim. L. Amici Briefs 15, 17–18 (2017) (predicting that McDonnell "might have been convicted on the evidence presented, had the jury been properly instructed on the elements of bribery").

the personal benefits that officials have received via their leadership PACs. Is there any meaningful distinction between the use of leadership PAC money to fund Melania Trump's fashion consultant and potential clothing purchases and a CEO's gifting Mrs. McDonnell a full-length white leather coat?[45] Are Congressman George Holding's $11,000 tab at a private members' club in London, Senator Bill Nelson $40,000 Disney and Universal expenses, and Congressman Robert Andrews' $16,000 in family vacation expenses more acceptable than payment of Duke Cunningham's yacht club fees and vacation expenses simply because they came from lawfully organized political committees? While the path to the personal benefit takes a more circuitous route when the money is filtered through a leadership PAC, the end result is the same: public officials receive private, personal benefits by leveraging their official positions.

The fact that members of Congress can legally use leadership PAC contributions to achieve the same end result that they could with an illegal bribe speaks to the special corruption risk that leadership PACs present. That risk could easily be realized where a savvy donor contributes to an official's leadership PAC, sharing even an implicit understanding with the official that the contribution could then be converted to personal use or used to perpetuate the leadership PAC fundraising cycle that supports many members' lifestyles. The leadership PAC contribution provides an added layer of insulation from liability and presents much less risk than a donor's direct payment to an official. The special corruption risk that leadership PAC donations carry is augmented by the difficulty in proving *quid pro quo* exchanges. The donor only needs to make a legal campaign contribution and let the official convert it for his personal benefit as he sees fit. Without "smoking gun" evidence of an agreement from wiretaps or cooperating witnesses, prosecutors face a high burden in linking an alleged agreement and contribution to an official act. With an avenue to indirectly provide a personal benefit to a public official through a legitimate campaign contribution, that burden increases.

It is true that an individual donor can provide more money and more expensive valuables to candidates outside the reach of FECA's contribution limits by simply rewarding them directly. But the

[45] Amy Davidson Sorkin, *The McDonnells' Friend Jonnie*, THE NEW YORKER (Aug. 1, 2014) https://www.newyorker.com/news/amy-davidson/mcdonnell-virginia.

increased contribution limits for leadership PACs, compared to those for authorized campaign committees, allow for leadership PAC contributions to reach levels that are not insignificant. While a candidate committee can only accept $2,900 per year from an individual donor, a leadership PAC can accept $5,000.[46] These annual contribution limits can quickly add up. A candidate for the House of Representatives can accept $5,800 in contributions to his or her authorized committee in a two-year election cycle but $10,000 in contributions to his or her leadership PAC; a Senator in the course of a six-year election cycle can accept $30,000 for his or her leadership PAC from an individual donor. Although Jefferson and Cunningham's ostentatious bribery schemes saw them receive hundreds of thousands of dollars of benefits, these are atypical examples, and bribery charges often stem from amounts less than the annual leadership PAC contribution limit.[47] The potential for leadership PACs contributions to be used to achieve the functional equivalent of a bribe while insulating the donor and public official from bribery charges provides a compelling reason to apply the personal use restriction to all political action committees. Similar concerns arise in the context of illegal gratuities.

D. Campaign Contributions as Illegal Gratuities

While bribery charges tied to campaign contributions recur with some frequency in American politics, campaign contributions are rarely alleged to be illegal gratuities, for two principal reasons. The first is the risk of criminalizing the typical, and perfectly legitimate, campaign contribution made in response to the performance of an official act that a constituent found favorable. Courts have expressed concerns about "the chilling effect that an expansive reading of bribery and gratuities statutes could have on well-established political practices."[48] In *United States v. Brewster*, a case concerning the illegal gratuities conviction of a former Senator who accepted cash payments from a mail-order catalogue business

[46] FEC, *Contribution limits*, https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/contribution-limits/.
[47] *See, e.g.*, United States v. Terry, 707 F.3d 607, 610 (6th Cir. 2013) (upholding an honest services fraud conviction for $500 campaign contribution to a judge and $700 worth of stationary, envelopes, and car magnets for his campaign); United States v. Pawlowski, No. 18-3390, 7–17 (3d Cir. 2020) (upholding bribery convictions of the former mayor of Allentown, Pennsylvania for accepting campaign contributions in amounts including $2,500, $2,700, $2,250, $17,300, and $5,000).
[48] George D. Brown, *The Gratuities Offense and the Rico Approach to Independent Counsel Jurisdiction*, 86 GEO. L.J. 2045, 2062 (1998).

that had an interest in the outcome of pending postal rate legislation,[49] these over-criminalization concerns were explicit. The court noted that "[n]o politician who knows the identity and business interests of his campaign contributors is ever completely devoid of knowledge as to the inspiration behind the donation"[50] and "[e]very campaign contribution is given to an elected public official probably because the giver supports the acts done or to be done by the elected official."[51] Because of the potential overbreadth of the illegal gratuity statute due to its lack of a specific intent requirement, courts have generally construed the statute's "for or because of any official act" language to require some level of knowledge that the official was being rewarded for his or her official act.[52] Despite judicial recognition of the need for a knowledge requirement, Professor Daniel Lowenstein has argued that a campaign contribution should never be treated as something "of value" under Section 201(c) and that Congress and state legislatures should amend gratuity statutes to reflect this.[53]

The second reason that campaign contributions are rarely alleged to be illegal gratuities is Section 201(c)'s requirement that the public official accept something of value "personally."[54] Because campaign contributions to candidates are typically made to their authorized campaign committees, the official does not benefit personally for the purposes of the statute, even though he or she may have received a personal *political* benefit in some sense as a result of the campaign contribution. The *Brewster* court interpreted the gratuity statute along these lines, noting that an official's acceptance of "all *bona fide* contributions directed to a lawfully conducted campaign committee or other person or entity are not prohibited by 201[(c)]. What is outlawed is only the knowing and purposeful receipt by a public official of a payment, made in

[49] United States v. Brewster, 506 F.2d 62, 65–67 (D.C. Cir. 1974).
[50] *Id.* at 81.
[51] *Id.* at 73 n. 26.
[52] *See, e.g.*, United States v. Evans, 572 F.2d 455, 480–81 (5th Cir.), *cert. denied*, 439 U.S. 870 (1978) (noting the lack of specific intent requirement but assessing whether things of value are accepted "knowingly and purposefully and not through accident, misunderstanding, inadvertence or other innocent reasons"); United States v. Brewster, 506 F.2d 62, 76 (D.C. Cir. 1974) (noting that the "for or because of any official act" language in the gratuity statute "carries the concept of the official act being done anyway, but the payment only being made . . . with a certain guilty knowledge . . . that the donor was paying him compensation for an official act" and "evidence of the Member's knowledge of the alleged briber's illicit reasons for paying the money is sufficient").
[53] Daniel H. Lowenstein, *When Is a Campaign Contribution a Bribe?*, *in* PRIVATE AND PUBLIC CORRUPTION 135 (William C. Heffernan & John Kleinig eds., 2004).
[54] 18 U.S.C. § 201(c).

consideration of an official act, for *himself* ."[55] The section of the Department of Justice's Criminal Resource manual on bribes and gratuities reflects this reasoning. It specifies that a bribe can include a campaign contribution but for a gratuity, "the payment must inure to the personal benefit of the public official and cannot include campaign contributions."[56] A separate section of the DOJ Manual on campaign contributions clarifies that it is "problematical that a gratuity charge under 201(c) can rest on a *bona fide* campaign contribution, unless the contribution was a ruse that masqueraded for a gift to the personal benefit of the public officer."[57]

In theory, the restriction on candidates' appropriation of campaign committee contributions for personal use would also prevent a candidate from violating 201(c) by accepting campaign contributions—if a candidate cannot use the contribution on personal expenses that would exist in the absence of candidacy, he or she will not benefit personally from the contribution. But a public official who circumvents the personal use restriction may violate Section 201(c). *Brewster* provides an example of such evasion.

In *Brewster* the D.C. Circuit made clear that *bona fide* campaign contributions typically will not violate Section 201(c), although it did note that circumstances where the committee receiving the contribution was shown to be an "alter ego committee of the defendant could have been considered as having been 'for himself' under the more limited language of the gratuity section."[58] There, a lobbying firm arranged cash payments to Senator Daniel Brewster of Maryland and a $5,000 union contribution to a committee that Brewster established shortly after receiving the contribution.[59] The committee was ostensibly formed for educational purposes but in reality served merely as a "conduit"[60] for political contributions that Brewster then drew upon personally—Brewster paid himself $3,000 from the committee's account and used its funds to purchase tickets to political dinners, office supplies, and public

[55] United States v. Brewster, 506 F.2d 62, 77 (D.C. Cir. 1974) (emphasis added).
[56] Department of Justice, *Bribery of Public Officials*, https://www.justice.gov/archives/jm/criminal-resource-manual-2041-bribery-public-officials.
[57] Department of Justice, *Criminal Resource Manual Other Issues*, https://www.justice.gov/archives/jm/criminal-resource-manual-2046-other-issues.
[58] United States v. Brewster, 506 F.2d 62, 75–76 (D.C. Cir. 1974).
[59] *Id.* at 65.
[60] *Id.* at 81.

opinion polls.[61] Although the case was remanded for a new trial due to erroneous jury instructions, the fact that this was a sham committee serving as an alter ego of the Senator indicated that the contributions could support an illegal gratuities conviction on remand.[62]

E. Leadership PACs and the Illegal Gratuity Risk

The increasingly widespread personal use (and borderline personal use that is justified as being tied to fundraising or a campaign purpose) of leadership PAC contributions should lead courts and prosecutors to reconsider the limited applicability of Section 201(c) to campaign contributions. Applying the personal use restriction to leadership PACs would serve as a backstop to the illegal gratuity statute, which donors and members of Congress can potentially violate when they convert leadership PAC contributions to personal use.

As discussed in the previous section, campaign contributions, even if they are given to a public official in support of his or her official act, are rarely considered illegal gratuities because the official does not realize the benefit personally. However, the various examples of leadership PAC spending that come close to or would otherwise qualify as personal use are a unique subset of contributions in which the contribution actually does inure to the benefit of the official personally. These contributions allow officials to convert campaign contributions to the same personal benefit that Senator Brewster did through his alter ego committee. Of course, a validly existing leadership PAC registered with the FEC is a legitimate entity unlike Brewster's sham committee that was formed to receive unreported contributions. But like Brewster's sham committee, leadership PACs can serve as conduits through which candidates can use contributions to benefit themselves personally.

This presents a greater risk that a legitimate leadership PAC contribution can satisfy the elements of the illegal gratuity offense. In a basic example, an industry group contributes to a member's campaign

[61] *Id.* at 66, 70.
[62] *Id.* at 81.

committee to reward the member's vote on a recent bill that the group supported.[63] Along with the contribution, the group includes a note to the member thanking him for his vote, making it clear that the contribution was made to thank him for his favorable vote. Here, many of the elements of the gratuity offense are satisfied: a public official has accepted a thing of value in the form of a campaign contribution, for his official act (the vote on the bill) as demonstrated by the note. The note arguably provided the requisite level of knowledge that the official was being rewarded for his or her official act, which courts look for in applying the illegal gratuity statute.[64] However, the official does not benefit personally from the contribution. Indeed, the Justice Department's guidelines suggest limiting or altogether ruling out any possibility of prosecution for such a campaign contribution in this situation.

But what if the group's contribution was instead to the official's leadership PAC, and he subsequently converted it to personal use? The final element of the illegal gratuity offense has been satisfied when the personal benefit is received—the leadership PAC in this situation is akin to Brewster's alter ego committee that exposed him up to liability for receiving an illegal gratuity. Leadership PAC contribution patterns do not reveal how common such an exchange is, but it remains an option that candidates and savvy donors can easily take advantage of. The Supreme Court's narrow interpretation of an official act in *McDonnell*[65] also limits the exposure of members of Congress to illegal gratuity violations, but as the personal use of leadership PAC contributions becomes more widespread among members of Congress, the risk of such arrangements may increase.

The risk of violating the gratuity statute increases in the context of member-to-member contributions, which sometimes involve an unambiguous trade of official acts. Leadership PAC contributions between members of Congress often implicitly involve the exchange of votes, which are clear

[63] *See also* Daniel H. Lowenstein, *When Is a Campaign Contribution a Bribe?*, *in* PRIVATE AND PUBLIC CORRUPTION 134 (William C. Heffernan & John Kleinig eds., 2004) (providing the example scenario on which this hypothetical is based).
[64] *See supra* note 130.
[65] In its 2016 decision in McDonnell v. United States, the Court limited the scope of the "official act" requirement of Section 201(b) in overturning the bribery conviction of Virginia Governor Robert McDonnell. The Court held that to qualify as an official act under Section 201, "the public official must make a decision or take an action *on* that question or matter, or agree to do so . . . [s]etting up a meeting, talking to another official, or organizing an event (or agreeing to do so)—without more—does not fit that definition of 'official act,'" and McDonnell's promoting of the supplement in meeting, phone calls, and inquiries about possible studies thus did not constitute official acts. McDonnell v. United States, 136 S. Ct. 2355, 2370, 2372 (2016).

examples of official acts. As discussed in Part I, in 1978, Henry Waxman's newly established leadership PAC, with authorization from the FEC, set a precedent by contributing $24,000 to his fellow House Energy and Commerce Committee members in exchange for their votes in the committee leadership contest. Congressman Tom DeLay took a similar approach in the 1994 House Majority Whip contest, but his largesse made Waxman's contributions look quaint by comparison. After announcing his candidacy, DeLay formed the Republican Majority leadership PAC and contributed $2 million to his dozens of his Republican colleagues.[66] His opponent, Congressman Robert Walker, made one contribution of $1,000 and lost the party vote, observing after the contest: "Leadership PACs equal 'I'm giving you this help, I expect your support,' . . . I think leadership PACs are a perversion of the system."[67]

Vote-trading facilitated by leadership PAC contributions continues in Congress. For example, in the days leading up to a close vote on the American Clean Energy and Security Act in 2009, four leadership PACs associated with Democrats contributed $130,000 to forty-one undecided Democratic members of Congress.[68] Congressman Jim Clyburn's leadership PAC contributed $60,000 to members just two days before the vote on the bill, which narrowly passed by seven votes.[69] In an example on the Republican side, John Boehner's leadership PAC made $420,000 in contributions to House Republicans in December 2011 to shore up support the day before a close vote on a budget bill, the Middle Class Tax Relief and Job Creation Act.[70]

While there was no explicit recognition by Waxman's colleagues, or House Democrats and Republicans in these examples, that the contributions influenced their votes, courts only require some degree of knowledge that the recipients were being rewarded for their official acts, in contrast to the bribery statute's *quid pro quo* requirement. A jury could certainly find some level of knowledge existed given the

[66] Issue One, *supra* note 13, at 5; Eric Pianin, *In House GOP Brawl, Whip's Skills Counted for Survival*, WASHINGTON POST (Nov. 10, 1998), https://www.washingtonpost.com/wp-srv/politics/govt/leadership/stories/delay111098.htm.
[67] Helen Thorpe, *The Exterminator How did Tom Delay become the most powerful man in Congress? By trying to squash his enemies—from the president to fellow Republicans who won't follow the party line*, Texas Monthly (Apr. 1999), https://www.texasmonthly.com/news-politics/the-exterminator/.
[68] PETER SCHWEIZER, EXTORTION 68 (2013).
[69] *Id.*
[70] *Id.* at 71–72.

close temporal nexus between the contributions and the favorable votes. Now, in a slight variation on the facts, imagine that the contributions were made to the members' leadership PACs, and one of those members purchased plane tickets for his family's vacation, thus converting the contribution to personal use. The elements of Section 201(c) have been satisfied. A public official (the member of Congress) received something of value (a leadership PAC contribution) for an official act (his favorable vote on pending legislation), personally (for his family's vacation).

This hypothetical simplifies how easily one can trace the path of how a specific contribution is used, but it illustrates how a somewhat typical contribution in the leadership PAC context could satisfy the elements of the illegal gratuity offense. The goal of this paper is not to recommend aggressive enforcement of the gratuity statute against sitting members of Congress for conduct that remains legal. However, analyzing the personal use restriction in relation to the gratuity offense highlights how the personal use loophole could allow members of Congress to commit violations of a key federal anti-corruption statute that is rarely applied to campaign contributions based on the assumption that they will not be used for an official's personal benefit.

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The Honorable Judge Juan R. Sanchez
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Dear Chief Judge Sanchez,

My name is Ryan Shaffer and I am a rising 3L at New York University School of Law applying for a clerkship in your chambers for the 2024 term.

In beginning my career as a civil rights attorney focused on wrongful conviction, police brutality, and related claims, I am eager to gain a wide scope of experience at the trial level. I am particularly interested in clerking for a district court to gain a strong understanding from a highly successful judge, fellow clerks, and practitioners on the ins and outs of the trial process, as I believe mastery of such is necessary for effective client representation. Moreover, given your experience as a public defender, I am especially interested in gaining additional, unique insight on the intersections and distinctions between criminal and civil law and serving clients in pushing back against the criminal legal system.

Please see attached for my application materials, including my resume, law school transcript, writing sample, and recommendation letters. The letters are from Professor Arthur Miller (arthur.r.miller@nyu.edu; 212-992-8147), who I worked for as a full-time research assistant and teaching assistant, Professor Melissa Murray (mem228@nyu.edu; 212-998-6440), who I worked for as a teaching assistant, and Center for Constitutional Rights Legal Director Baher Azmy (bazmy@ccrjustice.org; 212-614-6464).

I would welcome the opportunity to discuss my credentials further and provide any additional information and documents as might be helpful in reviewing my application.

Respectfully,

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EXPERIENCE

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Herd Law Firm, PLLC, Houston, TX
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Drafted motions, briefs, and related documents for filing, with particular experience drafting responses to motions for summary judgment. Researched case law and examined evidence produced by opposing counsel to prepare internal memos and evaluate trial strategies. Documented notes during personal injury and maritime client meetings.

Digital Literacy Project, Waltham, MA
Founder and President, March 2018 - May 2021
Implemented large-scale, sustainable project to provide technology services and personalized support to individuals experiencing or at risk of experiencing homelessness. Assisted 15+ participants access housing, job placement, or government identification. Organized and hosted frequent professional training resources for 20+ volunteers to improve presentation and communication skills with low-income and marginalized populations.

ADDITIONAL INFORMATION

6 years of volunteer work teaching intellectually disabled children in religious school, mathematics, and history. 14 years of experience playing classical saxophone. Avid Yankees fan. Amateur breakfast taco chef.

Name: **Ryan D Shaffer**
Print Date: **06/07/2023**
Student ID: **N12415378**
Institution ID: **002785**
Page: **1 of 1**

New York University
Beginning of School of Law Record

Fall 2021

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Rachael B Liebert			
Criminal Law	LAW-LW 11147	4.0	A-
Instructor: Randy Hertz			
Procedure	LAW-LW 11650	5.0	A-
Instructor: Arthur R Miller			
Contracts	LAW-LW 11672	4.0	B+
Instructor: Kevin E Davis			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Emma M Kaufman			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2022

School of Law
Juris Doctor
Major: Law

Constitutional Law	LAW-LW 10598	4.0	A
Instructor: Melissa E Murray			
Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Rachael B Liebert			
Legislation and the Regulatory State	LAW-LW 10925	4.0	B
Instructor: Adam M Samaha			
Torts	LAW-LW 11275	4.0	A-
Instructor: Catherine M Sharkey			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Emma M Kaufman			
Financial Concepts for Lawyers	LAW-LW 12722	0.0	CR

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2022

School of Law
Juris Doctor
Major: Law

Civil Rights	LAW-LW 10265	4.0	A-
Instructor: Baher A Azmy			
The Law of Nonprofit Organizations	LAW-LW 11276	3.0	A
Instructor: Jill S Manny			
Orison S. Marden Moot Court Competition	LAW-LW 11554	1.0	CR
Teaching Assistant	LAW-LW 11608	2.0	CR
Instructor: Arthur R Miller			
Theories of Discrimination Law Seminar	LAW-LW 12699	2.0	A-
Instructor: Sophia Moreau			
Artificial Intelligence and Administrative Law Seminar	LAW-LW 12831	2.0	A-
Instructor: Catherine M Sharkey			

	AHRS	EHRS
Current	14.0	14.0
Cumulative	44.0	44.0

Spring 2023

School of Law
Juris Doctor
Major: Law

Complex Litigation	LAW-LW 10058	4.0	A-
Instructor: Samuel Issacharoff Arthur R Miller			
Professional Responsibility in Criminal Practice Seminar	LAW-LW 10200	2.0	A-
Instructor: Jennifer Elaine Willis			
Government Civil Litigation Externship - Eastern District	LAW-LW 10253	3.0	CR
Instructor: Dara A. Olds			
Government Civil Litigation Externship - Eastern District Seminar	LAW-LW 10554	2.0	A
Instructor: Dara A. Olds			
Advanced Trial Simulation	LAW-LW 11138	2.0	A
Instructor: David R Marriott Evan R Chesler			
Orison S. Marden Moot Court Competition	LAW-LW 11554	1.0	CR
Teaching Assistant	LAW-LW 11608	2.0	CR
Instructor: Melissa E Murray			

	AHRS	EHRS
Current	16.0	16.0
Cumulative	60.0	60.0

McKay Scholar-top 25% of students in the class after four semesters
Staff Editor - Law Review 2022-2023

End of School of Law Record

TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW
JD CLASS OF 2023 AND LATER & LLM STUDENTS

I certify that this is a true and accurate representation of my NYU School of Law transcript.

Grading Guidelines

Grading guidelines for JD and LLM students were adopted by the faculty effective fall 2008. These guidelines represented the faculty's collective judgment that ordinarily the distribution of grades in any course will be within the limits suggested. An A + grade was also added.

Effective fall 2020, the first-year J.D. grading curve has been amended to remove the previous requirement of a mandatory percentage of B minus grades. B minus grades are now permitted in the J.D. first year at 0-8% but are no longer required. This change in the grading curve was proposed by the SBA and then endorsed by the Executive Committee and adopted by the faculty. Grades for JD and LLM students in upper-level courses continue to be governed by a discretionary curve in which B minus grades are permitted at 4-11% (target 7-8%).

First-Year JD (Mandatory)	**All other JD and LLM (Non-Mandatory)**
A+: 0-2% (target = 1%) (see note 1 below)	A+: 0-2% (target = 1%) (see note 1 below)
A: 7-13% (target = 10%)	A: 7-13% (target = 10%)
A-: 16-24% (target = 20%)	A-: 16-24% (target = 20%)
Maximum for A tier = 31%	***Maximum for A tier = 31%***
B+: 22-30% (target = 26%)	B+: 22-30% (target = 26%)
Maximum grades above B = 57%	***Maximum grades above B = 57%***
B: remainder	B: remainder
B-: 0-8%*	B-: 4-11% (target = 7-8%)
C/D/F: 0-5%	C/D/F: 0-5%

The guidelines for first-year JD courses are mandatory and binding on faculty members; again noting that a mandatory percentage of B minus grades are no longer required. In addition, the guidelines with respect to the A+ grade are mandatory in all courses. In all other cases, the guidelines are only advisory.

With the exception of the A+ rules, the guidelines do not apply at all to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students.

In classes in which credit/fail grades are permitted, these percentages should be calculated only using students taking the course for a letter grade. If there are fewer than 28 students taking the course for a letter grade, the guidelines do not apply.

Important Notes

1. The cap on the A+ grade is mandatory for all courses. However, at least one A+ can be awarded in any course. These rules apply even in courses, such as seminars, where fewer than 28 students are enrolled.
2. The percentages above are based on the number of individual grades given – not a raw percentage of the total number of students in the class.
3. Normal statistical rounding rules apply for all purposes, so that percentages will be rounded up if they are above .5, and down if they are .5 or below. This means that, for example, in a typical first-year class of 89 students, 2 A+ grades could be awarded.
4. As of fall 2020, there is no mandatory percentage of B minus grades for first-year classes.

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

Pomeroy Scholar:	Top ten students in the class after two semesters
Butler Scholar:	Top ten students in the class after four semesters
Florence Allen Scholar:	Top 10% of the class after four semesters
Robert McKay Scholar:	Top 25% of the class after four semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year, nor to LLM students.

Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

Class Profile

The admissions process is highly selective and seeks to enroll candidates of exceptional ability. The Committees on JD and Graduate Admissions make decisions after considering all the information in an application. There are no combination of grades and scores that assure admission or denial. For the JD Class entering in Fall 2021 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 174/170 and 3.93/3.73.

Updated: 10/4/2021

NYU | LAW

MELISSA MURRAY
Frederick I. and Grace Stokes
Professor of Law

New York University School of Law
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New York, NY 10012
P: 212 998 6440
M: 510 502 1788

melissa.murray@law.nyu.edu

June 1, 2023

Dear Judge:

I am writing to recommend **Ryan Shaffer**, a rising third-year student at New York University School of Law, as a law clerk in your chambers. A *summa cum laude* graduate of Brandeis University, Ryan was a student in my Spring 2022 Constitutional Law class. He was a standout student in that class and he has done equally well throughout his time at NYU Law. I have gotten to know him well through his work as a teaching assistant for my Spring 2023 Constitutional Law class. Suffice to say, Ryan is a safe bet to be a fantastic judicial clerk. As a former law clerk to two federal judges (Hon. Sonia Sotomayor and Hon. Stefan R. Underhill), I am confident that Ryan would make a wonderful addition to any chambers.

As a student in my Spring 2022 Constitutional Law class, Ryan was an active and conscientious class member. He made thoughtful, incisive contributions, but he never attempted to dominate the discussion. Instead, his contributions often referenced comments from other members of the class, building on their points to advance the conversation. Ryan was also a standout student in other ways. My class involves true, "old-school" cold-calling. In order to hone critical thinking and extemporaneous speaking skills, students are peppered with questions about the reading without any advance warning—and I do not allow them to pass or defer questions. The conditions are difficult, but Ryan was consistently excellent. He was always prepared to provide answers to straightforward doctrinal questions, as well as to more theoretical fare that drew connections between seemingly disparate doctrinal content. His engagement and curiosity with the subject matter extended beyond the classroom. Ryan regularly attended office hours where he asked sharp questions on a range of issues.

Given Ryan's performance in class and in office hours, I fully expected him to do well on the exam. I was not disappointed on this front. In an exceptionally strong class of students,

Ryan wrote a phenomenal exam, receiving the second-highest grade in the class. Indeed, his performance on the exam convinced me that he would make an excellent clerk.

Exams reward those who can, under time pressure, produce clear and pointed writing about the state of the law and its impact. Ryan's exam indicates that he is very capable of producing the kind of clear, comprehensive writing that is expected in a judge's chambers.

Ryan's strong performance in Constitutional Law was no anomaly. As you will see from his transcript, he has performed incredibly well at NYU Law, earning high marks in most of his graded classes. To be very clear, Ryan's is a very strong academic record—particularly at NYU, where our rigorous grading curve sharply limits the number of "A" grades that may be awarded.

I was so impressed with Ryan's performance in Constitutional Law that I invited him to be one of my four teaching assistants for the course in Spring 2023. In that capacity, he has continued to impress. Some students approach a TA position with an eye toward doing the bare minimum. Ryan approached the position with a strong desire to be a helpful guide to the students, while also supporting my pedagogical goals. He and the other TAs held weekly office hours that provided students with another forum for asking questions and seeking advice. For example, Ryan independently proposed, planned, and executed with his co-TAs, review sessions at the end of each section of the course, something the TAs had not done in my previous classes. As he explained, his experiences as a student and as a TA for my colleague, Arthur Miller, made clear that students needed additional opportunities to contextualize and "bookend" their learning. The TA-led review sessions served this purpose and were wildly popular with the students. In my view, they really helped to concretize core concepts, making the run-up to exams considerably easier for me and the students.

They will be a staple in my classes going forward. In addition to these innovations, Ryan also went to great lengths to meet with students outside his scheduled office hours upon request, including after classes officially concluded. At every turn, he demonstrated a serious commitment to a role that many other students treat as a free ride. Through this work, it is clear that Ryan cares deeply about engaging meaningfully with complex subjects, taking his

responsibilities seriously, and providing assistance wherever possible. These are the kind of qualities that make for an excellent law clerk.

I should note that Ryan's strong academic performance and his exemplary work as a TA are complemented by his busy schedule of extracurricular commitments. He is a Senior Executive Editor of the *New York University Law Review*, NYU Law's flagship law review. This elected position makes clear the esteem in which he is held by his fellow editors. But more importantly, as a senior board member, Ryan has worked assiduously to ensure that the law review works efficiently and well. He has worked to develop an internal feedback system for junior editors to help them improve their editing skills. And, as a member of the journal's Collective, a subcommittee focused on brainstorming and implementing big-picture changes to benefit Law Review's editors, Ryan has ushered in changes that has made the law review experience more rewarding for all staffers.

As with everything he does, Ryan has given considerable thought to his clerkship search. He believes, as I do, that a clerkship will be an ideal foundation from which to launch a career in public interest civil rights work. He will be a remarkable addition to your chambers—smart, industrious, capable, with a down-to-earth friendliness that makes him a joy to be around. I am confident that he will be extremely successful as a clerk and civil rights lawyer, and I highly recommend him as a clerk without reservation. I hope you will give his application close consideration. If I can be of further assistance, please feel free to contact me at melissa.murray@nyu.edu or via telephone at (510) 502-1788.

Sincerely Yours,

Melissa Murray
Frederick I. and Grace Stokes Professor of Law
Law clerk to the Hon. Sonia Sotomayor (2003-04)
Law clerk to the Hon. Stefan R. Underhill (2003-02)

centerforconstitutionalrights

June 12, 2023

RE: Ryan Shaffer, NYU Law '24

Your Honor:

I am the Legal Director of the Center for Constitutional Rights (CCR), where I supervise work our work related to racial justice, prisoners' rights, immigrants' rights, LGBTQI+ rights, and rights of Guantanamo detainees and victims of torture. Prior to this position, I was a tenured law professor at Seton Hall Law School, where I taught Constitutional Law for ten years and directed a Constitutional Law Clinic. I am currently an Adjunct Professor at NYU and Yale Law Schools, where I teach courses on Civil Rights Law. I clerked, many moons ago, for the late, Honorable Dolores K. Sloviter, then-Chief Judge of the Third Circuit Court of Appeals. I write to highly recommend Ryan Shaffer for a clerkship in your chambers.

Ryan was an outstanding student in a four-credit Civil Rights Law course I taught at NYU in the Fall 2022. It is a doctrinal course covering the theory and practice of Section 1983, Bivens, immunities and defenses for state, municipal and federal actors, modes of liability under Monell, other Reconstruction-era civil rights statutes (1981, 1982, 1985(3)), modern civil rights statutes (Title VII, FHA) and standing and damages. It is material, I dare say, that would be quite useful for a law clerk to have mastered, not to mention that he served as Melissa Murray's Constitutional Law teaching assistant and Arthur Miller's research assistant. Ryan's comprehension of the course material as revealed by his engagement while on-call and by the sharpness of his questions (or answers to other student questions) placed him among the top 5 students out of the 74 in the course. Ryan is exceedingly sharp and understood deeply complex doctrinal material (intersection between implied statutory rights of action and Section 1983; intersections between the Bivens new context analysis and qualified immunity) and could explain it back in a fluid, unlabored way. His academic grasp of complex material was genuinely superior and his genuine curiosity came through consistently. In the very strict curve required for a large lecture class, he received a high "A-" and the writing was clear, thoughtful and sophisticated.

I admire Ryan's deep – dare I say profound – commitment to social justice, which is grounded in life experiences in an economically vulnerable part of the South. In college he founded and directed an organization that worked with individuals at risk of or experiencing homelessness, years volunteering to tutor intellectually disabled children and during our study of prisoner rights litigation he shared moving experiences of his childhood proximity to

666 broadway, 7 fl, new york, ny 10012
t 212 614 6464 f 212 614 6499 www.CCRjustice.org

incarcerated persons. I am excited to know Ryan will be interning with CCR's co-counsel in the remedial/monitorship phase of the Floyd stop-and-frisk litigation, and that we will likely to be working together – he was so deeply invested in learning about that litigation, in terms of doctrine and strategy. Ryan is a considerate, caring person who, while mastering doctrine, is eager to see and understand the impact of law on the lives of real people, especially marginalized persons.

Given Ryan's deep intellectual proclivity, his commitment to learning and practice, and his seemingly indefatigable work ethic, I am most confident he will make an excellent law clerk. Ryan is also a self-aware, respectful and congenial person so I think will also make a positive interpersonal contribution to life in chambers.

I urge you to give Ryan very strong consideration. If you have any questions or concerns, please feel free to contact me directly at 212.614.6427 or bazmy@ccrjustice.org.

Very truly yours,

/s/ Baher Azmy

Baher Azmy

New York University
A private university in the public service

School of Law

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New York, New York 10012-1099
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Email: arthur.r.miller@nyu.edu

Arthur R. Miller
University Professor

Dear Judge:

I am writing on behalf of Ryan Shaffer, who is applying for a position as your clerk a year or two after his graduation from the New York University School of Law in the Spring of 2024. Based on Mr. Shaffer's excellent first-year classroom and examination performance, I invited him to be one of my research assistants for the summer following his first year. He also was a member of the Complex Litigation course I teach with Professor Issacharoff this past Spring and a very effective teaching assistant for my civil procedure course in the fall of his second year.

As a research assistant Mr. Shaffer edited and updated certain portions of the annual supplementation of a chapter related to admiralty jurisdiction and the extensive revision of other sections in the multivolume Wright and Miller Federal Practice and Procedure treatise. In addition he helped update and edit sections of a Civil Procedure hornbook I coauthor focusing on the chapters related to the admiralty material. This was part of an effort to produce a new edition of the book, which has now been published. In the course of these projects, Mr. Shaffer did a considerable amount of research, editing, and writing on the subjects assigned to him, much of which required the exercise of a great deal of thought, writing ability, legal analysis and judgment on his part. He is an extremely hard worker; indeed his work product exceeded that of most of my full-time researchers.

Ryan's research and writing was extensive and uniformly excellent. His work product was complete and sound, demonstrating considerable mental capacity, a very good command of research techniques, writing ability, and organizational skills. He also was able to master several aspects of federal civil procedure and subject matter jurisdiction, some of which were quite complex and not covered in his first year procedure course. He writes clearly and logically with an excellent sense of structure and idea sequence.

Ryan is extremely bright, thoughtful, analytically sound, and takes instruction and direction well. He stood out in a very, very strong group of research assistants last summer. He also is constantly aware of the importance of professional improvement – he wants to learn and develop his legal skills. Mr. Shaffer is a very helpful person by nature. He is conscientious and volunteered several times during our work together to assist other researchers get things done so that we could meet publishing deadlines for the annual supplementation of the treatise and revision of the hornbook and a volume of the treatise. Whenever I needed him, he was there. Ryan's work always was done in timely fashion, with great care and great attention to detail. Indeed, one of his strengths is that attention to detail, which he exhibited in editing the manuscript for the revision of the hornbook. He understood fully the professional character

and utility of his work. He is curious about issues, both legal and non-legal, and will dig into his assigments well beyond the norm. I consider Ryan to have been an extremely reliable, loyal, and dedicated research assistant. I rank him very, very highly among the summer researchers I have worked with in each of my more than sixty years of law teaching and employing multiple law students every summer.

Mr. Shaffer has a solid commitment to the law as a profession. I have no doubt about his seriousness in terms of long-term career development. I am certain he will do well with his experience doing public interest work this summer following his second year of law school. Ryan is an extremely likable, cheerful, and good-natured individual; he has a most pleasant personality and is a good conversationalist. I thoroughly enjoy his company, even though most of it was virtual during his first year procedure course because of Covid. He is mature, broad gauged in his outlook, fields of interest, and is very much interested in the future of the legal profession and the world around him.

On the basis of my experience with him, Ryan should fit in extremely well in the collegial environment of a judge's chambers. He worked effectively and bonded with the other researchers the summer he spent with me and clearly is well-liked by his classmates. The same should be true with regard to working with you and your other clerks and staff. I recommend him to you with great confidence that he can perform whatever tasks you ask of him. This is a very talented young man as evidenced by his superb academic performance at NYU. He deserves your most serious consideration.

If I can be of any further assistance to you with regard to Ryan, please do not hesitate to communicate with me.

Sincerely,

Arthur R. Miller

This piece was prepared during and for use in the opening round of NYU's 2022-2023 Orison S. Marden Moot Court competition.

The writing is entirely my own and has not been reviewed for feedback by any peers, supervisors, professors, competition organizers, or any other third-party. To the extent anyone other than myself has read this piece and given feedback on any component of it, that feedback has not been communicated to me.

The Questions Presented and Table of Authorities have been removed for convenience.

TABLE OF CONTENTS

STATEMENT OF FACTS

Tosca Conservatory of Figaro State University maintains one of the world's preeminent musical academies. (R. at 2.) Drawing vaunted international instructors, particularly for its renowned kazoo program, admission is heavily sought after. (R. at 2.)

Professor Brünhilde von Strauss Brunhilde ("Respondent") plays a crucial role in this program, instructing each student in their second foundational course in kazoo. (R. at 2.) Teaching an abnormal curriculum focused on motives and means behind music, many students have critiqued her pedagogy. (R. at 2-3.) Similarly, Dean Ludwig Wolfgang ("Petitioner") has repeatedly informed Respondent that such teachings prove gratuitous. (R. at 3.)

A member of the Church of the Holy Tune, Respondent believes gender is identical to the sex assigned at birth. (R. at 3.) At the start of the 2021-2022 academic year, Respondent announced that she would only refer to students by their "correct" pronouns. (R. at 16.) Students Harmony Smith, Melody Jones, and Finnegan O'Toole, each using names and pronouns distinct from those assigned at birth, informed Respondent of their respective pronouns and requested to be referred to in accordance with their identities. (R. at 3.) Respondent refused. (R. at 3.)

For weeks on end, the students pleaded to be called by their names and pronouns. (R. at 3.) Instead, Respondent exclusively referred to these students by names and pronouns that did not belong to them. (R. at 3.) Finally, the students took the only course of action left available: filing a Title IX complaint with the University. (R. at 3.)

The complaint noted that Respondent seriously and detrimentally impacted each student. (R. at 16.) Notably, Smith felt their identity was being wholly invalidated, and O'Toole suffered considerably in his musical abilities, regressing from the top performer in his year to the middle of the pack. (R. at 16.) Upon receipt of the report, Petitioner placed Respondent on temporary paid

administrative leave, pending completion of the Title IX Office's investigation, to prevent further harm before the parties could reach a mutually agreeable solution. (R. at 3.)

Outraged, Respondent and her church engaged in a media campaign and series of protests against the University, dragging the private affair into the public eye. (R. at 14.) Simultaneously, Respondent sued Petitioner and the University's Board, seeking declaratory and injunctive relief for reinstatement. (R. at 8.) Respondent argued that her pronoun usage constituted protected speech and that the University unlawfully retaliated against her. Both parties agreed to resolve the matter through competing motions for summary judgment. (R. at 9.) The District Court ruled in favor of Petitioner on both issues. (R. at 7.) The Court of Appeals reversed on both counts. (R. at 12.)

SUMMARY OF THE ARGUMENT

Respondent's use of pronouns against the wishes of her students does not constitute protected speech. First, application of the academic freedom doctrine is precluded as it covers only institutions. Moreover, Respondent forfeited this protection by speaking on matters unrelated to scholarship or teaching and creating a hostile learning environment. As such, speaking within her official duties as a professor rather than as a citizen disqualifies her from protection broadly. Even if Respondent spoke outside of these duties, her speech did not concern a matter of public interest. Further, the University's interest in workplace efficiency outweighs any interests of Respondent in using pronouns in this way. As such, the First Amendment does not protect her speech.

Respondent's placement on temporary paid administrative leave does not constitute an adverse employment action. Such leave did not result in any material employment disadvantage, nor does this form of leave deter employees from engaging in protected activity. As every circuit considering the issue has held, temporary paid leave, without more, is not an adverse employment action. After a de novo review, this Court should rule in favor of Petitioner on both counts.

ARGUMENT

"Whether the inherent character of a statement places it beyond the protection of the First Amendment is a question of law" that this Court reviews de novo. Peel v. Att'y Registration & Disciplinary Comm'n, 496 U.S. 91, 108 (1990).

1. RESPONDENT'S CHOICE OF PRONOUN USAGE CONTRARY TO THE IDENTITIES OF HER STUDENTS DOES NOT CONSTITUTE PROTECTED SPEECH UNDER THE FIRST AMENDMENT

Whether the First Amendment protects a public employee's speech generally turns on whether the speech is a "matter of . . . public concern" in which "free and open debate is vital to informed decision-making by the electorate." Pickering v. Bd. Of Educ., 391 U.S. 563, 571-72 (1968). When public employees speak on a matter of public concern, courts "balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Id. at 568. However, this test typically does not apply to speech made as part of an employee's official duties, which remains open to employer discipline. Garcetti v. Ceballos, 547 U.S. 410 (2006). Even so, one limitation of Garcetti is that it does not automatically extend to academia, as this Court has signaled the importance of education free from government control. Id. at 425. Respondent contends that her use of pronouns meets this "academic freedom" exception, which precludes any application of Garcetti to university professors. (R. at 4.)

A. The Academic Freedom Doctrine Protects Only Institutions, Not Employees

This Court has long recognized the importance of the freedom of a university "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978) (quoting Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J. concurring)).

Following this sentiment, most circuits recognizing academic freedom have limited the right to institutions, refusing to extend it to employees. See, e.g., Urofsky v. Gilmore, 216 F.3d 401, 412 (4th Cir. 2000) (en banc) ("The Supreme Court, to the extent it has constitutionalized a right of academic freedom at all, appears to have recognized only an institutional right . . . ."); Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 800 (5th Cir. 1989) ("Although the concept of academic freedom has been recognized in our jurisprudence, the doctrine has never conferred upon teachers the control of public school curricula."); Borden v. Sch. Dist., 523 F.3d 153, 172 (3d Cir. 2008), cert. denied, 129 S. Ct. 1524 (2009) (holding that employees act "as the educational institution's proxy during . . . in-class conduct, and the educational institution, not the individual teacher, has the final determination in how to teach the students"); Emergency Coal. to Def. Educ. Travel v. U.S. Dep't of the Treasury, 545 F.3d 4, 19 (D.C. Cir. 2008) (Silberman, J., concurring) ("[T]he university has a right to control at least the outer limits of its professors' lectures . . . .").

Moreover, this Court has never recognized that employees possess a right to academic freedom, despite opportunities to do so. See Bakke, 438 U.S. at 312 (defining academic freedom as "the freedom of a university to make its own judgments as to education"); Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 226 (1985) (noting that courts have a "responsibility to safeguard [educational institutions'] academic freedom"); Epperson v. Arkansas, 393 U.S. 97 (1968) (refusing to invalidate a statute on the basis that it infringed a teacher's right to academic freedom).

These decisions embody a common theme: the purpose of academic freedom is to protect institutions from intrusion by the government, not to protect professors from universities. As Bakke emphasizes, institutions have final control over the education they offer. Similarly, this Court has made clear that academic freedom focuses on the relationship between the legislature and universities, not between universities and their employees. See Keyishian v. Bd. of Regents,

385 U.S. 589, 603 (1967) (holding that academic freedom represents "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom").

Respondent's argument that such doctrine extends to individual professors at all proves misguided. Given that the dispute here is between a university and its employee rather than a university and a legislative act, no precedential justification exists to expand the doctrine of academic freedom to Respondent. This court ought to avoid overly broadening the scope of free speech law here, as doing so would re-write the First Amendment without statutory justification.

B. Respondent's Speech was Not Related to Scholarship or Teaching and Created a Hostile Learning Environment

Should this Court expand academic freedom to protect university employees in disputes with their employers, such extension would not apply to Respondent. Circuits that have applied the doctrine to professors have placed important limitations on what deserves protection, such that the speech must clearly relate to scholarship or teaching and may not create a hostile learning environment. See, e.g., Demers v. Austin, 746 F.3d 402, 406 (9th Cir. 2014) (holding academic freedom applies only "to speech related to scholarship or teaching"); Gorum v. Sessoms, 561 F.3d 179, 186 (3d Cir. 2009) (refusing to consider academic freedom as the speech was "clearly . . . not speech related to scholarship or teaching") (internal quotation marks omitted); Bonnell v. Lorenzo, 241 F.3d 800, 823-24 (6th Cir. 2001) (holding that any right to academic freedom is "not absolute to the point of compromising a student's right to learn in a hostile-free environment").

Respondent's use of pronouns did not relate to scholarship or teaching. Respondent's course was not designed to contain serious discussion about gender identity, nor does any evidence suggest it ever did. As Petitioner informed Respondent numerous times, discussion of motives and means behind music proved excessive for a course in kazoo, let alone discussion of gender or personhood. (R. at 3.) This proves markedly distinct from Meriwether v. Hartop, 992 F.3d 491

(6th Cir. 2021), which the Court of Appeals here relied on heavily. There, the Sixth Circuit granted a professor the academic freedom exception for his use of pronouns in a political philosophy course where the concept of gender came up "often" through regular discussion and where pronoun usage could "catalyze[] a robust and insightful in-class discussion." Meriwether, 992 F.3d at 506. Similarly, in Demers, the court protected a professor's speech where his ideas, "if implemented, would have substantially altered the nature of what was taught at the school, as well as the composition of the faculty that would teach it." Demers, 746 F.3d at 415. There exists no similarity in circumstances here. Respondent did not teach a course that naturally touched on gender such that pronoun usage could have contributed to a meaningful conversation and had no plans to alter the scope or means through which teaching occurred at the University. As such, although using pronouns might relate to scholarship or teaching in some cases, it did not here.

Even if the speech related to scholarship or teaching, Respondent created an unprotectable hostile learning environment. Bonnell made clear that courts cannot allow academic freedom when it would create a "hostile learning environment that ultimately thwarts the academic process." Bonnell, 241 F.3d at 824. "To hold otherwise" would allow professors to use the First Amendment "as a shield" and "use their unique and superior position" to harass students in violation of a university's legal requirements to "maintain a hostile-free learning environment." Id. at 823-24.

Respondent thwarted the academic process here, as her speech harmed the students as people and performers. (R. at 16.) Each student noted that "their class performance suffered," Jones complained the class proved "very hard on" her, Smith felt "their whole experience was being invalidated," and O'Toole regressed from the best musician in his year to merely average. (R. at 16.) Whether measured through student comfort or academic performance, Respondent thwarted the academic process by creating an unprotectable hostile learning environment.

C. Respondent Spoke as an Employee Rather than as a Citizen

Given that academic freedom does not protect Respondent's speech, Garcetti holds that the speech proves unprotected entirely as Respondent spoke as an employee pursuant to her official duties rather than as a citizen. Garcetti, 547 U.S. at 421-22. Determining whether an employee spoke pursuant to their official duties is a "practical" inquiry where "formal job descriptions" are not dispositive. Id. at 424-25. Two relevant, though not dispositive, factors are whether the speech occurred in the workplace and whether it concerned the subject matter of the employee's job. Id. at 420-21. Some circuits have held that other non-dispositive factors may include "the [employee's] job description; the persons to whom the [employee's] speech was directed; and whether the speech resulted from special knowledge gained through . . . employment." Kelly v. Huntington Union Free Sch. Dist., 675 F. Supp. 2d 283, 292 (E.D.N.Y. 2009).

Here, there exists no legitimate dispute as to whether Respondent spoke in her role as an employee. Respondent addressed these students in the classroom (i.e., the workplace) as part of her discussions with the class about kazoo (i.e., concerning the subject matter of her job). Moreover, Respondent's job description requires that she instruct students, she directed her speech to these students during class, and the relevant speech, the use of pronouns contrary to the students' identities, resulted from special knowledge gained through her employment as their professor. See also Wozniak v. Adesida, 932 F.3d 1008, 1010 (7th Cir. 2019) (noting that "how faculty members relate to students is part of their jobs"). As such, Respondent spoke according to her job duties as an employee; therefore, this use of pronouns cannot qualify as protected speech.

D. Respondent's Speech Did Not Concern a Matter of Public Interest, and the University has an Overriding Interest in Efficiency

As noted above, the First Amendment protects a public employee's speech only when the speech represents a matter of "public concern" where the employee's interest in speaking on the

matter outweighs the employer's interest in workplace efficiency. Pickering, 391 U.S. at 568, 571-72. Here, Respondent's use of pronouns cannot represent a matter of public concern; even if it did, the University would have an overriding interest in workplace efficiency.

Whether speech constitutes a matter of public concern proves a question of law examining the "content, form, and context" of the speech. Connick v. Myers, 461 U.S. 138, 147-48 (1983). Though no one factor is dispositive, content represents the most important of the three. Milwaukee Deputy Sheriff's Ass'n v. Clarke, 574 F.3d 370, 377 (7th Cir. 2009). For the Sixth Circuit, the central focus remains "the extent to which the speech advances an idea transcending personal interest or opinion which impacts our social and/or political lives." Dambrot v. Cent. Mich. Univ., 55 F.3d 1117, 1189 (6th Cir. 1995).

"[I]n the college classroom context, speech that does not serve an academic purpose is not of public concern." Buchanan v. Alexander, 919 F.3d 847, 853 (5th Cir. 2019). See also Martin v. Parrish, 805 F.2d 583, 585 (5th Cir. 1986) (Using profanity to castigate students not of public concern as it has no "academic purpose . . . ."); Bonnell, 241 F.3d at 820 (A professor "may have a constitutional right to use" vulgar words, but "does not have a constitutional right to use them in a classroom setting where they are not germane to the subject matter . . . ."); Dambrot, 55 F.3d at 1190 ("An instructor's choice of teaching methods does not rise to the level of" protection. (citing Hetrick v. Martin, 480 F.2d 705, 708-09 (6th Cir.), cert. denied, 414 U.S. 1075 (1973) (same))).

Respondent's speech served no academic purpose. Unlike the plaintiff in Meriwether, whose speech communicated a view germane to the usual discussions of a political philosophy class, Respondent's use of pronouns occurred in a course never designed to include such discussions, even under Respondent's abnormal curriculum. While issues related to the treatment of individuals based on gender identity are of public importance, Respondent did not "contribute

to the broader public debate on transgender issues." Kluge v. Brownsburg Cmty. Sch. Corp., 432 F. Supp. 3d 823, 839 (S.D. Ind. 2020) (holding that an orchestra teacher's use of pronouns in opposition to the identities of his students did not constitute speech on a matter of public concern).

Moreover, Respondent did not speak in opposition to any university rule on the matter, unlike in Meriwether, as no such policy existed here. "[E]ven speech on a subject that would otherwise be of interest to the public will not be protected if the expression addresses only the personal effect upon the employee, or if the *only* point of the speech was to further some purely private interest." Clarke, 574 F.3d at 378 (quoting Gustafson v. Jones, 290 F.3d 895, 908 (7th Cir. 2002)). Even if Respondent's speech could, in theory, be of public interest, her use purely as reference to students and not as part of a larger conversation regarding gender or university policy establishes that it was only to further Respondent's private interest. As such, it cannot be protected.

Even if Respondent spoke on a matter of public concern, the University's interests in workplace efficiency outweigh Respondent's interests in the speech. Whether an employee's interest outweighs the government's represents a question of law. Connick, 461 U.S. at 148 n.7.

This Court has long protected "a university's right to exclude even First Amendment activities that . . . substantially interfere with the opportunity of . . . students to obtain an education." Widmar v. Vincent, 454 U.S. 263, 276-77 (1981) (citing Healy v. James, 408 U.S. 169, 188-89 (1972) (same)). That each student maintains Respondent's speech made learning difficult and that O'Toole appreciably regressed in his abilities signals that Respondent's speech interfered with the opportunity of these students to obtain an education and cannot be protected.

This Court has also held that factors to consider in balancing these interests include whether the speech had a detrimental impact on "close working relationships" where "loyalty and confidence are necessary to their proper functioning," impeded the employee's "performance of .

. . duties," or "interfered with the regular operation" of the workplace. Pickering, 391 U.S. at 571-73. Here, Respondent's use of pronouns undoubtedly had a detrimental impact on her students, where loyalty and confidence in their close working relationship proved essential. Moreover, the speech impeded Respondent's performance, as these students could not learn to their fullest potential, and interfered with the regular operation of the workplace by reducing the quality of kazoo instruction given to the students. Even if Respondent had spoken on a matter of public concern, the University's interest in effective education overrides any possible protection.

2. RESPONDENT'S PLACEMENT ON TEMPORARY PAID ADMINISTRATIVE LEAVE DID NOT CONSTITUTE AN ADVERSE EMPLOYMENT ACTION FOR A FIRST AMENDMENT RETALIATION CLAIM

Respondent argues that her placement on temporary paid administrative leave pending completion of the Title IX Office's investigation represents an adverse employment action. This Court has held that adverse employment actions encompass more than just "ultimate employment decisions." Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67 (2006). However, circuits remain split as to how far this extends.

A. Placement on Temporary Paid Administrative Leave Does Not Per Se Result in a Material Employment Disadvantage

The Eighth Circuit holds that adverse employment actions "produce[] a material employment disadvantage." In re Kemp, 894 F.3d 900, 906 (8th Cir. 2018). Under this view, the action must lead to outcomes such as "termination, cuts in pay or benefits, [or] changes that affect an employee's future career prospects . . . ." Id. "Minor changes in duties or working conditions that cause no materially significant disadvantage do not meet the standard . . . ." Id.

Using this framing, which a plurality of circuits follow, better comports with the current state of the law. (R. at 6.) Moreover, this standard avoids straying from what this Court outlined in White and better protects the power of public universities to control "who may teach, what may be taught," and "how it shall be taught . . . ." Bakke, 438 U.S. at 312.

Under the standard in Kemp, Respondent's retaliation claim falls. Temporary placement on paid administrative leave during an investigation is not termination, does not reduce an employee's pay or benefits, and does not per se change the employee's future career prospects. Any change in career prospects comes not from the leave itself but from public awareness of the actions giving rise to the leave. Where any such change in career prospects might exist here, which remains unapparent based on the record, Respondent has only herself to blame. No harm would have occurred if Respondent and her church had not brought this issue into the public through suit and protest. Therefore, the placement cannot constitute an adverse employment action.

B. Placement on Temporary Paid Administrative Leave Does Not Deter Employees from Engaging in Protected Activity

Alternatively, some circuits hold that "the proper inquiry" into whether an employment action proves adverse "is whether the action is 'reasonably likely to deter employees from engaging in protected activity.'" Dahlia v. Rodriguez, 735 F.3d 1060, 1078 (9th Cir. 2013) (quoting Coszalter v. City of Salem, 320 F.3d 968, 976 (9th Cir. 2003)). However, the University's decision cannot represent an adverse employment action even under this standard.

Every circuit considering the issue has held that paid administrative leave during an investigation, without more, is not an adverse employment action. See, e.g., Perez-Dickson v. Bridgeport Bd. of Educ., 860 F. App'x 753, 756 (2d Cir. 2017) ("[A]dministrative leave with pay during the pendency of an investigation does not, without more, constitute an adverse employment action."); Jones v. Se. Pa. Transp. Auth., 796 F.3d 323, 326 (3d Cir. 2015) (same); Von Gunten v. Maryland, 243 F.3d 858 (4th Cir. 2001) (holding that categorically, paid leave alone is not an adverse action), abrogated on other grounds by White, 548 U.S. at 68; Breaux v. City of Garland, 205 F.3d 150 (5th Cir. 2000) (same); Sensabaugh v. Halliburton, 937 F.3d 621, 629 (6th Cir. 2019) (same); Nichols v. S. Ill. Univ.-Edwardsville, 510 F.3d 772, 787 (7th Cir. 2007) (same); Pulczinski

v. Trinity Structural Towers, Inc., 691 F.3d 996, 1008 (8th Cir. 2012) ("Placement on paid administrative leave pending an investigation does not meet" the standard for adverse employment actions.); Davis v. Legal Servs. Ala., Inc., 19 F.4th 1261, 1267 (11th Cir. 2021) (same).

Any differentiating factors in Dahlia do not apply here. There, the administrative leave represented an adverse action as it "prevented [Dahlia] from taking the sergeant's exam, required him to forfeit on-call and holiday pay, and prevented him from furthering his investigative experience . . . ." Dahlia, 735 F.3d at 1079. No such loss of income or career prospects exists for Respondent; thus, the leave here would not reasonably likely deter employees from engaging in protected conduct. Moreover, the court in Dahlia refused to hold that placement on leave outside the specifics of that case represents an adverse employment action. Id. at 1078-79. Given that all circuits considering the issue have held that mere temporary placement on paid administrative leave does not constitute an adverse employment action and the impacts of such leave here differ substantially from that in Dahlia, Respondent cannot prevail on her retaliation claim.

CONCLUSION

This Court should rule against Respondent on both counts. Respondent used pronouns against the express wishes of her students, not subject to legal protection, in a way that dramatically and detrimentally harmed these students as both people and musicians. The University's decision to temporarily place Respondent on paid leave represented not an adverse employment action but a lawful and careful measure to reduce the possibility of future harm before a mutually acceptable compromise. By ruling in favor of Petitioner, this Court would respect the educational institution's right to self-governance that this Court has long safeguarded and protect students from abuses brought on by otherwise untouchable professors.